(1) Supreme Court, U.S.
FILED

01 662 OCT 17 2001

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

OFFICE OF COMMUNICATION, INC.,
UNITED CHURCH OF CHRIST,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
& THE UNITED STATES OF AMERICA

and

MARYLAND/DISTRICT OF COLUMBIA/
DELAWARE BROADCASTERS ASSOCIATION, *et. al.,*
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

SHELBY D. GREEN
78 No. Broadway
White Plains, N.Y. 10603
(914) 422-4421
Counsel of Record

43 pp

Questions Presented For Review

I. In a facial challenge to the Federal Communications Commission's broadcast equal employment opportunity regulation that required licensees to conduct broad outreach and recruitment for every job vacancy and for licensees choosing one of two programs to collect data on the race, ethnicity and gender of applicants, did the lower court err by striking down the regulation in its entirety on equal protection grounds where the regulation had valid applications and where by its terms and by the agency representation, the regulation did not require licensees to target any racial or ethnic group in recruiting.

II. By an interpretation of the Federal Communications Commission's broadcast equal employment opportunity regulation that raised a constitutional question on which ground the regulation was declared invalid, did the lower court err where on its face and by the agency interpretation, the regulation was susceptible of an alternative construction.

Corporate Disclosure Statement

Petitioner, Office of Communication, Inc., United Church of Christ, is a not-for-profit, eleemosynary corporation, which was incorporated by the national chapter of the United Church of Christ, an association of churches of the same denomination. Neither of these entities issue stock and therefore neither has a parent corporation or stockholders.

Parties to the Proceeding

1. Federal Communications Commission, respondent.
2. The United States of America, respondent.
3. Office of Communication, Inc., United Church of Christ, petitioner.
4. MD/DC/DE Broadcasters Associations, *et. al.*, petitioners for review below. With the exception of the Georgia Association of Broadcasters, these parties are non-profit, incorporated trade associations comprised of broadcast station members. The Georgia Association of Broadcasters is an incorporated, for-profit trade association. None of the State Associations has issued any share or debt securities to the public. No parent company or publicly-held company has an ownership interest in any of the State Associations. The trade associations are: Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of

Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, New York State Broadcasters Association, Inc., North Carolina Association of Broadcasters, North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Radio Broadcasters Associations of Puerto Rico, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, West Virginia Broadcasters Association, Wisconsin Broadcasters Association, and Wyoming Association of Broadcasters.

5. MMTC, *et.al.*, intervenors below, are each non-profit organizations and are composed of individual members, with the exception of the African American Media Incubator, which is a non-profit educational institution that also serves as a civil rights advocacy organization. Each organization is either a trade association or a professional association. None of the organizations, or any of their parents, subsidiaries, or affiliates has issued any shares or debt securities to the public. The

organizations are: Minority Media and Telecommunications Council, African American Media Incubator, Alliance for Community Media, Alliance for Public Technology, Civil Rights Forum on Communications Policy, Cultural Environment Movement, Fairness and Accuracy in Reporting, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, National Asian Pacific American Legal Consortium. National Association of Black Owned Broadcasters, National Association of Black Telecommunications Professionals, National Association for the Advancement of Color People, National Association of Black Journalists, National Bar Association, National Council of La Raza, National Hispanic Foundation for the Arts, National Hispanic Medial Coalition, including its Los Angeles, New York, Chicago, Tucson, Albuquerque, Phoenix and San Antonio Chapters, National Latino Telecommunications Taskforce, National Urban League, People for the American Way, Project on Media Ownership, Puerto Rican Legal Defense and Education Fund, Rain/PUSH Coalition, Telecommunications Advocacy Project, Telecommunications Research and Action Center, and Women's Institute for Freedom of the Press.

6. National Organization for Women, *et. al.*, intervenors below, include the following organizations: National Organization for Women, a feminist organization, with a membership consisting of men and women; the Center for Media Education, a national non-profit organization; the Feminist Majority Foundation; the Philadelphia Lesbian and Gay Task Force, a civil and human rights advocacy organization; and Wider Opportunities for Women, a national women's employment organization. None of these organizations have parent companies, subsidiaries, or affiliates which have issued shares or debt securities to the public.

7. Amici Curiae below: American Federation of Television and Radio Artists; National Cable Television Association; NAMIC, Inc. and Women in Cable & Telecommunications, Inc.; Leadership Conference on Civil Rights; Congressional Black Caucus; National Council of the Churches of Christ in the USA; and Radio One, Inc., El Dorado Communications, Inc., Granite Broadcasting Corporation, Z-Spanish Media Corporation, Hispanic Broadcasting Corporation, Telemundo Group, Inc., Blue Chip Broadcasting, Inc., Brunson Communications, Inc., Stop 26-Riverbend, Inc., Rainbow Radio, L.L.C., and Entravision Communications, L.L.C.

Table of Contents

Questions Presented for Review ii

Corporate Disclosure Statement iii

List of Parties iii

Table of Contents vii

Table of Authorities viii

Citation to Opinions and Orders Entered in the Case xiii

Statement of Jurisdiction xiii

Constitutional Provisions, Statutes and Regulations xiii

Statement of the Case 1

Reasons for Granting the Writ 13

. I. Review is Warranted Because the Lower Court's Ruling Conflicts With the Standards Established by the Court for Evaluating Facial Challenges 14

A. The Lower Court Invalidated the Rule on the Basis of a Worst-Case Analysis that May Never Occur 17

B. The Lower Court Invalidated the Rule on the Ground that it Might Operate Unconstitutionally in One Hypothetical Circumstance 22

II. Review is Warranted Because the Lower Court's Failure to Apply the Court's Standards for Avoiding Constitutional Questions That Resulted in a Needless Conflict Among the Circuit Courts ... 24

Conclusion 28

Table of Authorities

Cases

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) ... 22
Allen v. Alabama State Bd. of Educ.,
164 F.3d 1347 (11th Cir. 1999), vacated by consent,
216 F.3d 1263 (11th Cir. 2000) 28
Auer v. Robbins, 519 U.S. 452 (1997) 20
Babbitt v. Sweet Home Chapter, Etc.,
515 U.S. 687 (1995) 14, 15
Bilingual Bicultural Coalition on Mass Media,
Inc. v. FCC, 595 F.2d 621, 628-29 (D.C. Cir. 1978) 2, 17
Billish v. City of Chicago, 962 F.2d 1269
(7th Cir. 1992), *vacated on other grounds*,
989 F.2d 890(7th Cir.)(en banc),
cert. denied, 114 S.Ct. 290 (1990) 28
Boos v. Barry, 485 U.S. 312 (1998) 25
Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) 20
Brockert v. Spokane Arcades, Inc., 472 U.S.
491 (1985) 14
California Coastal Comm'n v. Granite Rock Co.,
480 U.S. 572 (1986) 15, 20
City of Lakewood v. Plain Dealer Publ'g Co.,
486 U.S. 750 (1988) 14, 15
City of Richmond v. J.A. Croson, Co.,
488 U.S. 469 (1989) 22, 26
Communications Workers v. Beck, 487 U.S.
735(1988) 24
Crowell v. Benson, 285 U.S. 22 (1932) 25
Domingo v. New England Fish Co.,
727 F.2d 1429 (9th Cir. 1984) 23
Duffy v. Wolle, 123 F.3d 1026 (8th Cir. 1997) 27

Edmond v. United States, 520 U.S. 651 (1997) 25
Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 24
EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975) 23
EEOC v. Metal Serv. Co., 892 F.2d 341 (3d Cir. 1990) 23
Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548 (11th Cir. 1994) 27
Faragher v. Boca Raton, 524 U.S. 775 (1998) 22
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 23
Hayden v. County of Nassau, 180 F.3d 42 (2d Cir. 1999 . 28
Hazelwood School District v. United States, 433 U.S. 299 (1977) 23
Honadle v. Univ. of Vermont, 56 F. Supp. 2d 419 (D. Vt. 1999) 28
Hooper v. California, 155 U.S. 648 (1895) 25
INS. v. Nat'l Ctr. for Immigrants' Rights, 502 U.S. 193 (1991) 16
Janklow v. Planned Parenthood, 517 U.S. 1174 (1996) 15
Jones v. U.S., 529 U.S. 848 (2000) 25
Kraft Gen. Foods, Inc. v. Iowa Dep't of Rev. and Fin., 505 U.S. 71 (1992) 15, 16
Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998), pet. for reh'g denied, 154 F.3d 487, pet. for reh'g en banc denied, 154 F.3d 494 (D.C. Cir. 1998) 7, 8, 24
Monterey Mechanical Co. v. Wilson, 125 F.3d 702 (9th Cir. 1997) 28
Morales v. Daley, 116 F. Supp.2d 801 (S.D. Tex. 2000) 24

NAACP v. FPC, 425 U.S. 662 (1976) 2
Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998) 16
Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990) 15, 16
Peightal v. Metropolitan Dade County, 26 F.3d 1545 (11th Cir. 1994) 27
Public Lands Council, et. al. v. Babbitt, 529 U.S. 728 (2000) 16, 20
Raso v. Lago, 135 F.3d 11 (1st Cir. 1998) 27
Reno v. Flores, 507 U.S. 292 (1993) 15, 17
Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 20
Rust v. Sullivan, 500 U.S. 173 (1990) 15, 25
South Suburban Housing Ctr. v. Greater South Suburban Bd. of Realtors, 935 F.2d 868 (7th Cir. 1991) 28
Sussman v. Tanoue, 39 F. Supp.2d 13 (D. D.C. 1999) 24
United States v. Raines, 362 U.S. 17 (1960) 14, 15
United States v. Salerno, 481 U.S. 739 (1987) 12, 15, 22
United States v. Warren, 138 F.3d 1083 (6th Cir. 1998) 23
United States v. Witkovich, 353 U.S. 194 (1957) 25
Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) 23

Statutes

Cable Communications Policy Act of 1984, 47 U.S.C.§ 554 (1994 ed.) 4

Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 334 ..... 5, 6, 23

Civil Rights Act of 1964, 42 U.S.C. § 2000e 22, 23
Communications Act of 1934, as amended, 47 U.S.C.A. §151 *et. seq.*. ..... *passim*

Regulations

Broadcast EEO Rule, 47 C.F.R. §73.2080. ..... 9, 10

Agency Reports

Inquiry Into the Employment Policies and Practices of Certain Broadcast Stations Located in Florida, 44 FCC 2d 735 (1974) 4

In re Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 FCC Rcd 3967 (1987) 6
In the Matter of Amendment of Part VI of FCC Forms 301, 311, 314, 340, and 342, 32 FCC 2d 708 (1971 3

In re Amendment of Part 76 of the Commission's Rules to Implement the Equal Employment Opportunity Provisions of the Cable Communications Policy Act of 1984, 102 FCC 2d 562 (1985) 5

In the Matter of the Implementation of Commission's Equal Employment Opportunity Rules, 9 FCC Rcd 6276 (1994) 6, 7

In the Matter of Implementation of Section 22 of

the Cable Television Consumer Protection and Competition Act of 1992, Equal Employment Opportunities, 8 FCC Rcd 5389 (1993) 6

In re Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 23 FCC 2d 430, 431 (1970) 3

In the Matter of Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices, 18 F.C.C.2d 240 (1969) 2

In the Matter of Petition for Rulemaking to Require Licensees to Show Nondiscrimination in Their Employment Practices, 13 FCC2d 766, 770 (1968) 2

In the Matter of Review of the Commission's Broadcast & Cable Equal Employment Opportunity Rule and Policies and Termination of the EEO Streamlining Proceeding, Report & Order, 15 FCC Rcd 2329 (2000) ..... passim

In the Matter of Non-Discrimination in the Employment Policies and Practices of Broadcast Licensees, 60 FCC 2d 226 (1976) 4

Citation of the Official and Unofficial Reports of the Opinions and Orders Entered in the Case

MD/DC/DE Broadcasters Ass'n, et. al., v. FCC, 236 F.3d 13, *reh'g & reh'g en banc denied*, 253 F.3d 732 (D.C. Cir. 2001).

Statement of Jurisdiction

1. The original judgment in this case was entered on January 16, 2001.

2. The order denying rehearing and rehearing en banc was entered on June 19, 2001.

3. The statutory provision conferring on this Court jurisdiction to review on writ of certiorari the judgment or order in question is 28 U.S.C. § 1254(1).

Constitutional Provisions, Statutes, and Regulations Involved in the Case

1. The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall ... be deprived of life, liberty, or property without due process of law.... U.S. CONST. amend. V.

2. The Communications Act of 1934, as amended, 47 U.S.C.. § 151 (1994 ed. and Supp. V), provides in pertinent part:

> For purposes of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without

> discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nationwide, and worldwide wire and radio communication service ... there is created a commission to be known as the 'Federal Communications Commission....

3. The Communications Act of 1934, as amended, 47 U.S.C.. § 307(a)(1994 ed.), provides:

> The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

5. Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C.§ 334 (1994 ed.).

6. Cable Communications Policy Act of 1984, 47 U.S.C. §554(1994 ed.).

7. Broadcast EEO Rule, 47 C.F.R. §73.2080 (2000).

Pursuant to this Court's Rule 14.1(f), the full text of the Cable Television Consumer Protection and Competition Act of 1992, the Cable Communications Policy Act of 1984, and the regulation involved in this case are set forth in the Joint Appendix ("Joint App."), accompanying the Petition for Writ of Certiorari by Minority Media Telecommunications Council, *et. al.*

STATEMENT OF THE CASE

This case concerns a ruling by the lower court that declared invalid on equal protection grounds, the broadcast equal employment opportunity rule (the "EEO rule" or "rule") newly adopted by the Federal Communications Commission ("Commission"). *See In the Matter of Review of the Commission's Broadcast & Cable Equal Employment Opportunity Rule and Policies and Termination of the EEO Streamlining Proceeding, Report & Order*, 15 FCC Rcd 2329 (2000)("*R & O*"), Joint App. at 47a.. Though the rule was recently adopted, it was not the Commission's first word or effort on the subject. It was a restatement of more than thirty years of similar rules that both prohibited discriminatory hiring practices by broadcast licensees and established a policy to eliminate recruitment practices that operated to exclude job applicants on the basis of race, ethnicity or gender.

Under Section 151 of the Communications Act of 1934, as amended, 47 U.S.C. § 151, *et. seq.*, (1994 ed. and Supp. V) (the "Act"), the Commission is charged broadly with making available wire communications services without discrimination on the basis of race, color, religion, national origin, or sex. 47 U.S.C. § 151. Section 307(a) authorizes the Commission to grant a license to operate a broadcast station only when "the public convenience, interest or necessity will be served...." 47 U.S.C. § 307(a) (1994 ed.).[1]

---

[1]Also, section 309(j), added in 1997, requires the Commission, in designing rules for awarding licenses by competitive bidding, to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by ... disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women...." 47 U.S.C.A. § 309(j)(3)(B)(1994 ed. and

Up until the first formal rule was adopted in 1969,[2] the Commission's policy was to act upon individual complaints of discrimination and it did so on the basis that it was contrary to the "public interest, convenience or necessity" to grant or renew licenses to persons who engaged in racial discrimination.[3] That interpretation of the statute was approved by the Court in *N.A.A.C.P. v. F.P.C.*, 425 U.S. 662, 665, 670, n. 7 (1976)(elimination of discrimination from society is an important national goal and Congress could authorize regulatory agencies to act to combat it through regulations). *See also Bilingual Bicultural Coaltition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 628-29 (D.C. Cir. 1978)(*en banc*)(Commission required to investigate licensees' employment practices and, in assessing their character qualifications, consider whether they had engaged in intentional employment discrimination).

When it adopted the formal rule, the Commission determined that the complaint-oriented enforcement policy did not work, and in light of three decades of experience, was not expected to work.[4] The Commission had come to recognize that forces other than overt discriminatory practices worked against equal employment opportunity for racial and ethnic minorities. To a greater degree, the Commission found, the

---

Supp. V); *see also* 47 U.S.C. § 309(a)(1994 ed.)(applications for licenses granted in the "public interest, convenience and necessity"); 47 U.S.C. § 309(k)(1994 ed. and Supp. V)(renewal applications granted in "public interest, convenience and necessity").

[2] *In the Matter of Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 18 F.C.C.2d 240, 242-43 (1969).

[3] *In the Matter of Petition for Rulemaking to Require Licensees to Show Nondiscrimination in Their Employment Practices*, 13 FCC2d 766, 770 (1968).

[4] 18 F.C.C.2d at 243.

indifference of employers hindered qualified applicants and employees from being hired and promoted on the basis of equality, and employment sources did not normally supply job applicants regardless of race, color, religion or national origin, unless asked to do so by employers.[5] The formal rule thus required licensees to "establish, maintain, and carry out, a positive continuing program of specific practices designed to assure equal opportunity in every aspect of station employment policy and practice."[6] Subsequent amendments required licensees to develop and implement EEO programs in accordance with specific guidelines that required, among other things, the recruitment of minorities through employment advertisements in media with significant circulation among minority groups, the placement of notices at schools and colleges with significant minority-group enrollment, and contacts with minority and human relations organizations for referrals of applicants. Licensees were also to encourage present employees to refer minority applicants and to make known to all recruitment sources that qualified minority members were being sought for consideration whenever the station hired.[7]

In the years following, the Commission evaluated the efficacy of the rule and policies on several occasions. In a 1974 inquiry, it determined that employer neutrality was still as great a barrier to equal employment opportunity for women and

---

[5] *Id.*

[6] *Id.* at Appendix A.

[7] *In re Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 23 FCC 2d 430, 431, 436-37 (1970). In 1971, the rules were amended to include women within their coverage. *In the Matter of Amendment of Part VI of FCC Forms 301, 311, 314, 340, and 342*, 32 FCC 2d 708 (1971.

minorities as intentional discrimination.[8] In a 1975 inquiry, the Commission found that the general EEO guidelines did not adequately describe and exemplify the measures that licensees should undertake in their EEO efforts. In 1976, the Commission adopted a model EEO program, which in large measure incorporated the recruitment initiatives laid out in the previous guidelines.[9]

In subsequent amendments to the Act, Congress codified the then existing EEO rules and gave the Commission expanded rulemaking authority to ensure equal employment opportunity. Section 554(c) was added in 1984[10] and granted the Commission broad authority to adopt rules banning employment discrimination by cable operators and requiring them to "establish, maintain, and execute a positive continuing program of specific practices designed to ensure equal employment opportunity in every aspect of [their] employment policies and

---

[8] *Inquiry Into the Employment Policies and Practices of Certain Broadcast Stations Located in Florida*, 44 FCC 2d 735, 737-38 (1974).

[9] *In the Matter of Non-Discrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 FCC 2d 226, 228 (1976).

[10] Cable Communications Policy Act of 1984, Pub.L. No. 98-549, §2, 98 Stat. 2779, 2797 (1984), adding Section 554. Joint App. at 262a-268a. The House report accompanying this act stated that the amendments were intended to "codif[y] and strengthen[] the Commission's then existing equal employment opportunity regulations." H.R. Rep. No. 934, 98th Cong., 2d Sess. 86 (1984), reprinted in [1984] U.S. Cong. News 4655. The House Report noted that "while the employment record of the cable industry ha[d] improved in the years since the Commission first adopted equal employment opportunity regulations, women and minorities were still significantly underrepresented as employees and owners in the industry." *Id.* at 4723. The report stated further that "the committee strongly believe[d] that equal employment requirements [were] particularly important in the mass media area where employment is a critical means of assuring the program service will be responsive to a public consisting of a diverse array of population groups." *Id.*

practices."[11]

A 1992 amendment, Section 334(a), provided that "the Commission shall not revise" either the "regulations concerning equal employment opportunity regulations as in effect on September 1, 1992 ... as such regulations apply to television broadcast station licensees and permittees", or "the forms used by such licensees and permittees to report pertinent employment data to the Commission."[12] In this amendment, Congress found and declared that despite the EEO rules "females and minorities [were] not employed in significant numbers in positions of management authority in the cable and broadcast industries;" that "increased numbers of females and minorities in [such] positions ... advances the Nation's policy favoring diversity in the expression of views in the electronic media;" and that "rigorous enforcement of [EEO] rules [was] required ... to effectively deter racial and gender discrimination."[13]

---

[11] In 1985, pursuant to this amendment, the Commission adopted rules for cable operators. *In re Amendment of Part 76 of the Commission's Rules to Implement the Equal Employment Opportunity Provisions of the Cable Communications Policy Act of 1984*, 102 FCC 2d 562 (1985).

[12] This section was added by Section 634 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). Joint App. at 269a-273a. The conference report accompanying this legislation stated that Section 634 "codifie[d] the Commission's equal employment opportunity rules ... for television licensees and permittees. Conf. Rep. No. 862, 102 Cong., 2d Sess. 97 (1992).

[13] 106 Stat. at 1498, Joint App. at 269a-270a. This Act also amended Section 554. Subparagraph § 554(d)(3) required the collection of more specific employee data for certain cable job categories and required licensees to prepare reports for the evaluation of their recruitment efforts. In addition, it required the Commission to "prescribe revisions on the rules under this section in order to implement the amendments made to this section by such Act." 47 U.S.C. 554(d)(3)(A), (B)(1994 ed. and Supp. V), Joint App. at 270a-272. In 1993, the Commission adopted new rules for

Beginning in 1987, the Commission's evaluation of a licensees's compliance with EEO program requirements focused on the licensee's overall efforts.[14] If after a review of information on hand, such as the station's EEO program filed as part of the renewal application, any final determinations of discrimination by other government agencies, and the station's annual employment report, the Commission determined the licensee's EEO efforts to be unsatisfactory, it usually would request additional information, such as the number, sex, race or national origin and referral source of applicants and interviewees; the recruitment sources contacted; the number, race and sex of referrals received from the recruitment sources; and whether the station notified sources of minority and female referrals when vacancies occurred.[15] If the licensee was not in compliance, the Commission might order a remedy or sanction, including admonishment, reporting conditions, short-term renewal and/or monetary forfeiture. In cases of substantial noncompliance, the Commission might designate a renewal application for hearing to determine whether it should be granted or denied.[16]

When it amended Section 554 in 1992, Congress

---

cable operators as directed by this section. *In the Matter of Implementation of Section 22 of the Cable Television Consumer Protection and Competition Act of 1992, Equal Employment Opportunities*, 8 FCC Rcd 5389, 5394 (1993).

[14]*Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987). Prior to that time, the Commission evaluated compliance by particular reference to processing guidelines that looked to the employment of women and minorities overall and in upper level jobs relative to the labor force. *Id.*

[15]*Id.* at 3974.

[16]*In the Matter of Implementation of Commission's Equal Employment Opportunity Rules*, 9 FCC Rcd 6276, 6292 (1994).

ordered the Commission within two years to report on the effect and operation of the new provisions. In its report to Congress, the Commission stated that the rules and policies had been effective in promoting equal employment opportunity in the broadcast and cable industries, that during the particular period evaluated for the report (1986 and 1993), there had been a recognizable increase in the employment of women and minorities overall and in total upper level positions.[17] The Commission also reported that its efforts-based policy for evaluating licensee compliance was largely effective. Approximately 96% of the broadcast renewal applications were renewed without reporting conditions and/or sanctions, and over 90% of cable units were certified each year.[18] But because the levels of employment of minorities and women in the industry were still relatively low and because there was evidence of many instances in which licensees did not recruit at all in filling positions, the Commission concluded that the rule and policies were still necessary.[19]

The rule in effect just prior to the rule here was declared invalid in part by the lower court in *Lutheran Church-Missouri Synod v.* FCC, 141 F.3d 344 (D.C. Cir. 1998), *pet. for reh'g denied,* 154 F.3d 487, *pet. for reh'g en banc denied,* 154 F.3d 494 (D.C. Cir. 1998)("*Lutheran Church*"). The court ruled that the provisions of the prior rule that required a comparison of a station's employment profile with the relevant labor force as part of the initial analysis of a station's EEO program, was invalid because they "pressured stations to maintain a work force that mirrored the racial breakdown of their metropolitan

---

[17] *Id.* at 6279, 6294.
[18] *Id.* at 6314-15.
[19] *Id.*

statistical area" and thus set up a racial classification subject to strict scrutiny. 141 F.3d at 352. The court held that the rule was not narrowly tailored insofar as it applied to all station employees in the absence of evidence linking low-level employees to programming content, where one of the asserted grounds for the rule was diversity in programming. *Id.* at 356. The court did not evaluate the constitutionality of the rule as applied to women since that issue was not before it. It also did not reach the question of the Commission's authority to adopt an anti-discrimination rule and remanded the case to the Commission. *Id.* at 356.

In adopting the rule at issue, the Commission determined that it held the statutory authority to regulate the employment practices of broadcast licensees through regulations. *R & O* at ¶¶ 17-62, Joint App. at 571-99a. The Commission reiterated that a rule and policies that required licensees not merely to refrain from intentional discrimination, but also to "reach out in recruiting new employees beyond the confines of their circle of business and social contacts to all sections of their communities," was necessary to counteract the discriminatory effects of the "repeated hiring without broad outreach on minorities and women job candidates when they are poorly represented in an employer's staff -- particularly ... in the ranks of management employees who make hiring decisions." *R & O* at ¶3, Joint App. at 50a. The Commission explained that "it is not enough to say that one will not discriminate against anyone who applies for a job when not all have been given a fair opportunity to apply." *Id.* Rather, ["o]utreach in recruitment must be coupled with a ban on discrimination to effectively deter discrimination and ensure that a homogenous workforce does not simply replicate itself through an insular recruitment and

hiring process." *Id.*[20]

The Specific Requirements of the Rule

As general and overarching obligations, licensees were required to refrain from discrimination on the basis of race, color, religion, national origin, or sex, and to establish and carry out equal employment opportunity programs. 47 C.F.R.§ 2080(a), (b), Joint App. at 35a. They were also to recruit for every job vacancy and widely disseminate information about job openings to ensure that all qualified applicants were able to compete without discrimination. *Id.* As an additional specific requirement, licensees were required to engage in a supplemental recruitment measure, either the one whose terms were described in the rule (Option A) or one designed by the licensee (Option B). 47 C.F.R.§ 2080(c), (d), Joint App. at 35a-42a.

Under Option A, licensees were required to give notice of job openings to qualifying organizations that requested such notice and engage in two or four (depending on the size of the licensee) of certain longer-term recruitment initiatives selected from a menu contained in the rule. The menu's thirteen items included such activities as attending job fairs, working with job banks and participating in programs sponsored by educational institutions. Only two items made reference to activities involving groups or individuals defined in whole or in part, by race, ethnicity or gender -- co-sponsoring at least one job fair with, or listing each upper level job opening in a job bank or

---

[20]In the *Lutheran Church* opinion denying rehearing, the court stated that "[a] regulation encouraging broad outreach to, as opposed to the actual hiring of, a particular race would [not] necessarily trigger strict scrutiny". 154 F.3d at 492.

newsletter of, organizations whose membership includes the substantial participation of women and minorities. 47 C.F.R. § 2080(c)(2)(iii), (xii), Joint App. at 37a-38a. But because no more than four items needed to be selected during any two-year period, a licensee needed never to select either of these two items. And, licensees choosing Option A were not required to maintain data on the race, ethnicity or gender of either applicants or interviewees.

Under Option B, a licensee could design its own "broad and inclusive outreach program", but had to "demonstrate that it [was] widely disseminating information concerning job vacancies by analyzing the recruitment sources, the race, ethnicity and gender of the applicants attracted by its recruitment efforts." *R & O* at ¶¶ 78, 104, Joint App. at 112a, 129-30a.

The Lower Court Ruling

Maryland/District of Columbia/Delaware Broadcasters Associations, *et. al.* ("Broadcasters"), a group of trade associations, challenged the rule on its face on equal protection and statutory grounds, arguing, *inter alia*, that the rule pressured licensees to recruit and hire on the basis of race. Petitioner herein, Office of Communication, Inc., United Church of Christ, ("UCC"), also challenged the rule, arguing, *inter alia*, that the Commission acted arbitrarily and capriciously when failed to include in the new rule a requirement that licensees make specific efforts to reach minorities and women in their recruiting, as did the prior rule, and that the absence of such a requirement worked to undermine the stated regulatory objectives. Intervenors, Minority Media Telecommunications Council, *et. al.*, and the National Organization for Women, *et. al.*, intervened in support of the rule. Several amici curiae also

filed briefs in support of the rule.

The lower court exercised jurisdiction over the challengers' petitions for review pursuant to 47 U.S.C. § 402(a)(1994) and 28 U.S.C. § 2342 (1994). A panel of the lower court held the rule unconstitutional in part. *MD/DC/DE Broadcasters Ass'n, et. al., v. FCC*, 236 F.3d 13, 19, 20, *reh'g & reh'g en banc denied*, 253 F.3d 732 (D.C. Cir. 2001), Joint App. at 1a, 19a.

Option A was upheld because under it, a licensee was free "to select recruitment measures that did not place special emphasis on the presence of women and minorities in the target audience." 236 F.3d at 18-19, Joint App. at 1a, 19a. As such, the panel did "not believe that Broadcasters [were] meaningfully pressured... to recruit women and minorities." *Id.*

Option B was declared unconstitutional on the ground that the requirement to collect data on the race and ethnicity of applicants would pressure licensees to recruit on the same basis. The panel reasoned that because under the rule, "the Commission promises to investigate any licensee that reports 'few or no' applications from women or minorities" and that because "[i]nvestigation by the licensing authority is a powerful threat, almost guaranteed to induce the desired conduct," *(Id.* at 19, Joint App. at 10a, 13a), the rule "compelled broadcasters to redirect their necessarily finite recruiting resources so as to generate a larger percentage of applications from minority candidates."*Id.* at 20-21, Joint App. at 13a -14a. And, "[a]s a result, some prospective nonminority applicants who would have learned of job opportunities but for the Commission's directive now will be deprived of an opportunity to compete simply because of their race." *Id.* This in the panel's view established a racial classification subject to strict scrutiny, which

the rule did not survive. *Id.* at 22, Joint App. at 16a.

While the panel did not find the rule unconstitutional as to Option A, or as it applied to women, it refused to sever those parts of the rule from Option B. The panel dismissed UCC's petition as moot. *Id.* at 19, 22-23, Joint App. at 17a-18a.

The Commission, UCC and intervenors filed petitions for rehearing and for rehearing *en banc*. Those petitions were denied by a vote of five to three, with Judges Tatel, Edwards and Rogers voting in favor of rehearing *en banc*. *MD/DC/DE Broadcasters Ass'n, et. al., v. FCC*, 253 F.3d 732 (D.C. Cir. 2001), Joint App. at 19a. Judge Tatel filed a dissenting opinion in which Judges Edwards and Rogers joined. In the dissenting opinion, Judge Tatel pointed out that Broadcasters' facial challenge should have failed under the standards enunciated by the Court because they had not shown that under no circumstances the regulation would be valid. *Id.* at 736, *citing United States v. Salerno*, 481 U.S. 731, 745 (1987), Joint App. at 26a. To the dissenting judges, the rule on its face required no more than "outreach to the entire community", which did not require or pressure licensees to reduce their recruitment efforts as to white males. 253 F.3d at 737, Joint App. at 26a. Judge Tatel went on to show that the panel's finding that the rule pressured licensees to make recruiting efforts on the basis of race because of the threat of an investigation, was contradicted by the record, that "[t]he Commission never 'promised' to investigate licensees that report few or no applications from women or minorities." *Id.* at 738-39, Joint App. at 27a-28a, 30a. In Judge Tatel's view, there was only speculation by the panel about the rule's effects and "speculation that some broadcasters, imagining pressure from the Commission or misreading the agency's intentions, might go beyond what Option B requires is no reason to declare it facially

unconstitutional." *Id.* at 739, Joint App. at 30a.

Judge Tatel showed that Option B also did not exert pressure on licensees to recruit on the basis of race because, as one of two options, a licensee could avoid the data collection requirements and hence any pressure, by electing Option A. *Id.* at 738, Joint App. at 28a.

REASONS FOR GRANTING THE WRIT

The lower court ruling nullified more than three decades of rules and policies that were required both by the exigencies of the public interest and Congress to ensure that access to the nation's radio spectrum services is available to all without discrimination. In this respect, the ruling has negated the Commission's specific statutory power and duty to employ preventive measures against discriminatory practices. The ruling is especially disabling because industry-wide problems such as inequality of opportunity are not effectively addressed by case by case adjudication alone.

The ruling also leaves the Commission powerless to adopt regulations or enforcement policies of any sort, however firmly based on its own fact-finding and experience, to the extent that it can be pre-empted by a court finding its regulations unconstitutional on the basis of theoretical applications alone.

The lower court ruling also produces the incongruous result that whether similar measures for ensuring equal employment opportunity adopted by other agencies are held valid will depend on the circuit in which a challenge is brought, since every other circuit court that has considered the issue has upheld broad outreach and recruitment as race-neutral.

Review by this Court is therefore necessary to forestall these grave effects which, as we point out, are all based in the

lower court's substantial departure from the Court's standards for evaluating facial challenges to the constitutionality of a regulation, those on deference to an agency's interpretation of its own rules and those on constitutional avoidance. These points of error are discussed in turn.

I. Review is Warranted Because the Lower Court's Ruling Conflicts With the Standards Established by the Court for Evaluating Facial Challenges

The lower court held that the rule was invalid on its face on the ground that part of it might be applied in an unconstitutional manner. In so ruling, the lower court ignored the considerable import of the posture of the litigation, that it was a facial challenge. Like facial challenges in general, this was a claim that the rule was invalid in all of its applications. Such broad claims have warranted pause by the Court. *See Babbitt v. Sweet Home Chapter of Oregon, Etc.*, 515 U.S. 687, 699-700 (1995)(Stevens, J.)(challenging a regulation defining harm to endangered species to include habitat modification, petitioners "ask us to invalidate the Secretary's understanding of 'harm' in every circumstance, even when an actor knows that an activity, such as draining a pond, would actually result in the extinction of a listed species by destroying its habitat"). Indeed, "[t]he Court has historically been reluctant to entertain facial attacks on statutes, ... [t]he normal approach [being] ... to determine whether a law is unconstitutional as applied in the particular case..." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 774-75 (1988)(White, J., dissenting); *Brokert v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-03 (1985); *United States v. Raines*, 362 U.S. 17, 20-24 (1960). The reasons for this reluctance are both prudential and practical. "Confining the Court's attention to the actual impact of a law on the complaining party is a policy of restraint that rests upon the

time-tested advisability of having concrete, rather than hypothetical cases before it", and the Court "can arrive at informed judgments only when [it has] a record showing the actual impact of the challenged statute." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. at 776, n.4 (White, J., dissenting); *see also United States v. Raines*, 362 U.S. at 21.

Under this wisdom, a challenger "faces a heavy burden in seeking to have [a] regulation invalidated as facially unconstitutional." *Rust v. Sullivan*, 500 U.S. 173, 183 (1990); *see also Kraft Gen. Foods, Inc. v. Iowa Dep't of Rev. and Fin.*, 505 U.S. 71, 82 (1992)(Rehnquist, C.J., dissenting). It is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. at 745. While there appears some difference of view within the Court as to whether, despite this language in *Salerno*, to defeat a facial challenge, it is sufficient to point to one valid application of a statute, *Reno v. Flores*, 507 U.S. 292, 301 (1993)(quoting *Salerno)*; *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990)(quoting *Salerno*); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 589, 593 (1986)(the agency need "merely to identify a possible set of permit conditions not in conflict with federal law"), there does not appear to be any disagreement that "the fact that the [regulation] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [it] wholly invalid." *Salerno*, 481 U.S. at 745; *see also Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175-76, 1175, n.1 (1996)(Stevens, J., concurring in denial of certiorari and expressing the view that this, rather than the "no circumstances" language in *Salerno* characterizes the standard actually applied by the Court); *Babbitt v. Sweet Home Chapter of Communities*

for a Greater Oregon, Etc., 515 U.S. at 714 (O'Connor, J., concurring)(although possible to identify "at least one application of the regulation ... that [was] inconsistent with the regulation's *own* limitations," (emphasis in original), "[t]hat misapplication d[id] not...call into question the validity of the regulation itself"...where it "ha[d] innumerable valid...applications."); *Kraft Gen. Foods, Inc. v. Iowa Dep't of Rev. and Fin.*, 505 U.S. at 82 (1992)(Rehnquist, C.J., dissenting) (quoting second part of *Salerno* test); *Rust v. Sullivan*, 500 U.S. at 183(facial challenge fails when "on [its] face, the regulations are both authorized by the Act and can be applied to a set of individuals without infringing upon constitutionally protected rights"); *INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991)(that the regulation may be invalid as applied in certain cases does not mean that the regulation is facially invalid).

In no case, the Court has said, is it proper to "invalidate... [a]... statute based on a worst-case analysis that may never occur" or on "the mere possibility" of a violation of rights by the statute's operation." *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. at 513-14 (lower court erred by envisioning the improper disclosure of confidential data and by supposing delay by interpreting "days" to mean business and not calendar days); *see also Public Lands Council, et. al. v. Babbitt*, 529 U.S. 728, 750 (2000) (O'Connor, J., concurring) ("Petitioners ha[d] not shown how the new regulations themselves -- rather than specific actions the Secretary might take pursuant to those regulations -- violated the [statute's] requirement[s]); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998)("'We will not now pass upon the constitutionality of these regulations by envisioning the most extreme application conceivable, but will deal with those

problems if and when they arise.'"); *Reno v. Flores*, 507 U.S. 292, 310 (1993)("...we will not assume, on this facial challenge, that an excessive delay will invariably ensue").

A. The Lower Court Invalidated the Rule on the Basis of a Worst-Case Analysis that May Never Occur

There was no analysis by the lower court other than of the worst-case. That case began with a conclusion that the Commission would conduct an "investigatory hearing" on all licensees whose applicant pools showed few or no minorities, and that licensees, fearful of such a hearing, would engage in targeted recruitment and hiring, thereby "redirecting their necessarily finite resources" to the detriment of white males. *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 19-20, Joint App. at 10a, 13a, 14a. However, none of these conclusions had any support in the record. Neither the text of the rule, nor the *R & O* spoke of an investigatory hearing like that in the scenario drawn by the panel.[21] What the Commission did say was that

---

[21]It also appeared that the drastic investigatory proceeding the lower court had in mind was a license renewal hearing (at least that is what the author of the text cited by the lower court described), far different in objective and scope than an EEO investigation. Even under the prior and more demanding rule, EEO investigations usually entailed a request for additional information from the licensee and a review of the licensee's response to the inquiry, along with other relevant pleadings to determine if the broadcaster had engaged in adequate outreach. *See* discussion, *supra* at 6-7. A license renewal hearing, in contrast, is a rare and complex proceeding and undertaken only when there are substantive and material questions of fact concerning the broadcasters' qualifications to retain its license. 47 U.S.C § 309(e)(1994 ed.). In *Bilingual Bicultural Coalition on the Mass Media v. FCC*, 595 F.2d at 628 , the lower court explained that because the Commission's policies are prospective, it rarely designated license renewal applications for hearings solely to investigate substandard affirmative action performance. However, in implementing its anti-discrimination policy, of necessity, the Commission was required to

"few or no females or minorities in a broadcaster's applicant pool may be one indication (and only one indication) that the station's outreach efforts are not reaching the entire community." *R & O* at ¶ 120, Joint App. at 138a; *see also* ¶¶ 104, 222, Joint App. at 130a, 211a. And, what the Commission actually promised was that race and gender data collected would be significant only for the purpose of the licensees' evaluation of their recruitment practices. In the Commission's words: "the fact that a sizeable number of females or minorities have applied for openings will not necessarily establish the inclusiveness of the station's efforts" and that "even if few females or minorities actually apply for openings," it "may ultimately determine that outreach efforts are reasonably designed to reach the entire community." *R & O* at ¶120, Joint App. at 138a. The Commission explained that an assessment of licensees' recruitment programs:

> [would] be premised on all relevant factors ..., not on statistical records alone, [but including] the reach of the recruitment sources utilized ..., whether the broadcaster adequately analyzed the results of its efforts, implemented effective measures to correct any problems, and avoided excessive reliance on word-of-mouth recruitment, ... [but not] the extent to which minorities and women were actually hired or the

---

investigate broadcasters' past employment practices. A documented pattern of intentional discrimination would put seriously into question a licensee's character qualifications to remain a licensee. *Id.* at 628-29. While evidence of actual discriminatory conduct in most cases would present substantial and material questions of fact warranting a renewal hearing, evidence of minor statistical disparities between the available minority workforce and a station's minority employment, standing alone, in most cases, would not. *Id.* at 629-30.

> racial, ethnic or gender composition of a station employment workforce.

R & O at ¶115, Joint App. at 135a.

The Commission spoke directly on targeted recruitment:

> We believe that the objective of ensuring that minority and female applicants have the opportunity to apply for positions in the broadcast industry may be achieved without a specific requirement that broadcasters in every situation use recruitment methods that specifically target those groups. * * * While targeted sources can enhance the effectiveness of recruitment efforts, stations will be allowed to determine whether, when and how to use them to meet their individual circumstances."

R & O at ¶ 77, Joint App. at 110; *see also* ¶ 218, Joint App. at 208a ("we have decided, for policy reasons, not to require broadcasters to use recruitment sources specifically targeting minority and female job applicants").[22]

Not only, therefore, was there no evidence that the feared effects of Option B underlying the lower court's ruling would occur, there was clear evidence that they would not. Moreover, for those licensees unable to trust that the Commission would be bound by its representations, there was Option A, under which no data collection was required. *R & O* at ¶ 224, Joint App. at 212a.

---

[22]In fact, in the rulemaking proceeding, UCC and others urged the Commission to require targeted recruitment as it did under the prior rule, but those suggestions were rejected. *See R & O* at ¶¶ 77, 218, Joint App. at 110a, 208a.

The lower court was not free to ignore the Commission's representations as to meaning of the rule. It is a "cardinal principle" of statutory interpretation that a court must give an agency's interpretation of its own regulations "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *see also Robertson v. Methow Valley Citizen Council*, 490 U.S. 332, 359 (1989). So long as there is no basis to suspect that the agency's position represents anything less than its considered opinion, judicial deference is required. *Auer v. Robbins*, 519 U.S. 452, 462-63 (1997).

Deference to the agency should have determined the result here because the Commission's explanations and the text of the rule were entirely consistent. And, since the challenge was brought before seeing how the Commission in fact implemented the rule, the challengers had no basis on which to argue -- and the lower court no basis on which to rule -- that the Commission's true purpose was other than as stated. A facial challenge that the rule is invalid in all its respects, must "stand[] or fall[] on that assertion." *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. at 588 (government's assertion that permit requirement was for environmental regulation and not for land use planning that would be pre-empted, was enough to defeat a facial challenge); *see also Public Lands Council, et. al. v. Babbitt*, 529 U.S. at 751 (2000) (O'Connor, J.)(concurring)(of particular importance was the secretary's assurances).

Even as the lower court crafted a case out of hypotheticals, those used were not the only ones available for analysis. The court supposed that licensees' recruiting resources are fixed and finite, 236 F.3d at 20, Joint App. at 13a, and that to comply with the rule, these limited resources would be

redirected, with the elimination of some of the existing recruitment avenues theretofore relied on by white males.[23] *Id.* Joint App. 13a-14a. There was no citation to any evidence in the record either as to the recruiting budgets of individual licensees or as to industry convention, for this conclusion. It must therefore be accepted that it is just as plausible that licensees do not have fixed recruitment budgets any more than they do for the cost of electricity or attorney's fees, such expenses being determined by events (an unusual number of resignations, an unusually hot summer, an unexpected tort liability) outside the control of the licensee's advanced planning. To comply with the rule, licensees might well spend more to add recruitment sources, attributing the additional expenditure to the cost of regulation. It is also as likely a scenario that the licensee who is more budget-conscious would seek out and employ additional recruitment methods that are available at nominal cost, such as the posting of job vacancies on internet bulletin boards or e-mailing and faxing job announcements to various organizations. In the *R & O*, the Commission expressed approval of these methods of recruitment in fulfillment of the notification requirements of the rule. *R & O* at ¶ 97, Joint App. at 124a.

Thus, in a gross departure from the Court's standards, the lower court's analysis was only about possibilities, about

---

[23]The lower court went on to theorize that "[r]ecruiting expenditures are fixed in the short run; even if an employer increases its recruiting budget in response to the Commission's EEO rule, it then must follow the Commission's directive in determining how to allocate those funds." 236 F.3d at 20, n.***. Joint App. at 13a. But, even if it were so that licensees would use newly allocated funds to comply with the rules, such use would have no impact on white males, since with those new funds, the licensees would be adding and not eliminating recruitment measures.

how the Commission might evaluate future circumstances and about what licensees might think and do.

B. The Lower Court Invalidated the Rule on the Ground that it Might Operate Unconstitutionally in One Hypothetical Circumstance

Even if it were the case that some licensees, misinterpreting the rule, might feel pressured to make specific outreach efforts to persons based on race, it was still error to declare the rule invalid without also considering whether the rule had valid applications. *Salerno*, 481 U.S. at 745; *Rust v. Sullivan*, 500 U.S. at 183. If the lower court had looked for valid applications, it would not have needed to look far. Among other things, the rule required licensees to refrain from discriminatory practices and to engage in self-assessments to avoid the discriminatory effects of facially neutral practices. In speaking on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, (1994 ed. and Supp.V), the Court explained that that statute aims "not to provide redress but to avoid harm," *Faragher v. Boca Raton*, 524 U.S. 775, 806 (1998), that it is designed to "cause employers...to self-examine and to self-evaluate their employment practices." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). The rule having the same objective of equal employment opportunity also had the same valid applications.

Moreover, since racial data may be used lawfully to show gross statistical disparities, which may constitute prima facie proof of a pattern or practice of discrimination under Title VII, such data is useful to licensees in determining whether their recruitment practices are in accord with law. *See City of Richmond v. J.A. Croson* Co., 488 U.S. 469, 501 (1989)

("There is no doubt that '[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination' under Title VII."); *Hazelwood School District v. United States*, 433 U.S. 299,306 (1977)(same); *see also Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)(Title VII proscribes both overt discrimination as well as "practices that are fair in form, but discriminatory in operation"); *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 650 (1989)(objective or subjective selection practices, while facially neutral, but having an adverse effect on a protected group may be actionable).[24] The Commission's express statutory powers permit it to require licensees to avoid law violations.

There was also the Commission's representation that it would use applicant data for purposes of monitoring and evaluating industry trends, which it is required to do in order meaningfully to regulate wire communications services. *R & O* at ¶¶ 164-65, 225, Joint App. at 169a-170a; 1992 Cable Act, 47 U.S.C. §554(d)(3)(B).[25]

---

[24] *See also United States v. Warren*, 138 F.3d 1083 (6th Cir. 1998) (practice of advertising for job vacancies only in the predominantly white county and refusing to advertise in the more racially heterogeneous neighboring city was Title VII violation); *EEOC v. Metal Serv. Co.*, 892 F.2d 341, 350 (3d Cir. 1990)(informal word-of-mouth hiring process, "in conjunction with an all white workforce, is itself strong circumstantial evidence of discrimination"); *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1436 and n.3 (9th Cir.)(use of whites to recruit by word-of-mouth resulting in all white workforce and giving preferences to friends and relatives of existing employees was discriminatory), *modified on other grds*, 742 F.2d 520 (1984); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 313 (6th Cir. 1975)(reliance on referrals by a predominately white work force was discriminatory).

[25] This section requires the Commission to collect information on "hiring, promotion and recruitment practices necessary for the Commission

Since the rule could be applied in various ways to all licensees without infringing upon constitutionally protected rights, the facial challenge should have failed.

II. Review is Warranted Because the Lower Court's Failure to Apply the Court's Standards for Avoiding Constitutional Questions Resulted in a Needless Conflict Among the Circuit Courts

It is a deeply-rooted and time-honored rule of construction that a statute must be construed so as to avoid a constitutional question. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575

---

to evaluate the efforts of entities to comply with the provisions." 47 U.S.C. §554(d)(3)(B). The Commission has understood this directive to mean that cable operators "are expected to maintain sufficient documentation of their efforts to recruit qualified females and minorities for all vacancies". 8 FCC Rcd at 5395. In fact, as licensees, Broadcasters' constituents have been required by the Commission to maintain data on the racial make-up of their employment forces for three decades. *See R & O* at ¶¶ 164-65, 225, Joint App. at 169-170a, 212a. In *Lutheran Church*, 141 F.3d at 352, while the court objected to the requirement that licensees compare workforce data with the labor force, it did not rule unconstitutional the requirement that licensees collect such data in the first place. Indeed, it is well-established that government collection of data about the racial composition of an industry or the population in general is constitutionally permissible. *See Sussman v. Tanoue*, 39 F. Supp. 2d 13, 25 (D.D.C. 1999)("courts have not found requirements to collect data about the racial and gender make-up of a workforce to violate the Constitution"); *Morales v. Daley*, 116 F. Supp.2d 801 (S.D. Texas 2000)(observing that "*Adarand* [Constructors v. Pena, Inc., 515 U.S. 200 (1995)]... does not deal with government collection of data on race", in holding that census collection of racial data is constitutionally permissible); *cf* Jury Selection and Service Act of 1968, 28 U.S.C. § 1869(h)(requiring federal government to "elicit" the race of all individuals considered for jury duty). And, to the extent that they are employers covered by Title VII, Broadcasters' constituents have been required to collect data on the race and ethnicity of their employees under that statute. 29 C.F.R. §1602.7 (2001).

(1988); *Communications Workers v. Beck*, 487 U.S. 735, 762 (1988). Indeed, "every reasonable construction must be resorted to in order to save the legislation from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895). In this vein, an alternative interpretation that does not raise a constitutional question need only be "fairly possible". *Crowell v. Benson*, 285 U.S. 22, 62 (1932). "The principle enunciated in *Hooper* ... and subsequent cases, is a 'categorical' one: where such other interpretation exists, the Court's 'plain duty is to adopt that which will save the Act.'" *Rust v. Sullivan*, 500 U.S. at 190; *see also Edmond v. United States*, 520 U.S. 651, 658 (1997)("petitioners are asking us to interpret [the statute] in a manner that would render it clearly unconstitutional -- which we must of course avoid doing if there is another interpretation available"). Application of this canon may require a court to construe a statute narrowly or read into it limitations in order to negate the effect complained of which otherwise would raise a constitutional question. *Jones v. United States*, 529 U.S. 848, 857 (2000); *Edmond v. United States*, 520 U.S. at 658; *Boos v. Barry*, 485 U.S. 312, 330-31 (1988); *United States v. Witkovich*, 353 U.S. 194, 195, 202 (1957).

Accordingly, the lower court was required to find that the rule did *not* pressure licensees to recruit on the basis of race, because that construction was available. It was only by a most strained reading of the rule, ascribing to it proceedings and consequences the Commission had not adopted and had expressly disavowed, and by the indulgence in improbable hypotheticals, that the lower court was able to raise the constitutional question. Rather than read in limits (by accepting the agency's representations as to the effect of the objected to data collection), the lower court read into the rule what it regarded as constitutionally offensive provisions.

Moreover, the views expressed by the Court in *Croson*, 488 U.S. 469, and by other circuit courts on outreach requirements, counseled against adopting a construction calling into question the rule's constitutionality. In *Croson*, the Court rejected the assertion that government measures, merely because they have the object or effect of including minorities in the sharing of government benefits, are constitutionally suspect. Both the plurality and the concurring opinion of Justice Scalia made clear that race-neutral efforts that work to improve the ability of minorities to compete for government benefits, even where there is a corresponding disadvantage to whites, do not establish a constitutionally suspect classification. Writing for the plurality, Justice O'Connor explained in the context of public construction contracting that:

> simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect.*** [Such changes] would...serve to increase the opportunities available to minority businesses without classifying individuals on the basis of race.

488 U.S. at 509-10. Justice Scalia added:

> A State [may]...for example, ... adopt a preference for small businesses, ... which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race. *** Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial

> program aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks.

Id. at 526-27. Likewise, broad recruitment likely to increase the number of minorities reached does not offend the Constitution, but works to fulfill its guarantees.

Several other circuit courts have gone further, holding that recruitment and outreach measures having the specific aim of reaching minorities are not constitutionally suspect. In *Raso v. Lago*, 135 F.3d 11, 16-17 (1st Cir. 1998), the court held that a housing program to attract minority- as well as majority-race applicants, which included mailings to minority organizations and assurances of nondiscrimination, did not establish a forbidden racial classification.

In *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997), the Eighth Circuit held that "[a]n employer's affirmative efforts to recruit minority and female applicants did not constitute discrimination", but only helped to ensure that minorities and women were not discriminatorily excluded. The court pointed out that "[t]he only harm to white males is that they must compete against a larger pool of qualified applicants," which "of course, is not an appropriate objection and does not state a cognizable harm." *Id.* at 1038-39.

On two occasions, the Eleventh Circuit expressed approval of recruitment and outreach initiatives that required more than the rule here. *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1558 (11th Cir. 1994)(providing information and soliciting applications from minorities and women and making presentations at job fairs and college career days to apprise minorities and women of career opportunities, were race-neutral measures); *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994)(minority recruitment and application fee

waivers were "race-neutral").

In *Billish v. City of Chicago*, 962 F.2d 1269, 1290 (7th Cir. 1992), *vacated on other grounds*, 989 F.2d 890 (7th Cir.)(en banc), *cert. denied*, 510 U.S. 908 (1993), the court upheld "aggressive recruiting" to increase minority representation, as race-neutral.

In *South Suburban Housing Ctr. v. Greater South Suburban Bd. of Realtors*, 935 F.2d 868, 872, 884 (7th Cir. 1991), an "affirmative marketing" plan that required best efforts to attract whites and blacks; the placement of ads in newspapers with a circulation among a targeted race; the distribution of information to selected organizations and employers; and the keeping of records on the race of interested persons, was held not to violate the equal opportunity provisions of the Fair Housing Act.[26]

In sum, there were both authoritative and persuasive bases for an alternative construction of the rule. Yet, contrary to the command to use every reasonable construction to *save* the rule from unconstitutionality, the lower court adopted an unreasonable construction that would *expose* it to questions of constitutionality.

---

[26]*See also Allen v. Alabama State Bd. of Educ.*, 164 F.3d 1347, 1352 (11th Cir. 1999), *vacated by consent*, 216 F.3d 1263 (11th Cir. 2000)(strict scrutiny does not apply to efforts to recruit minority teachers when no one is disadvantaged on account of their race); *Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999)(modification of entrance exam to avoid unfairly excluding minority applicants not subject to strict scrutiny); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 711 (9th Cir. 1997)(suggesting validity of outreach program merely requiring distribution of ads in such a manner as to assure that all persons, including women-owned and minority-owned firms, had fair opportunity to bid); *Honadle v. Univ. of Vermont*, 56 F. Supp. 2d 419, 429 (D. Vt. 1999) (recruitment program targeting minorities does "not create a racial classification demanding strict scrutiny").

CONCLUSION

The lower court's ruling leaves the Commission unable to carry out the specific requirements of the governing statute to adopt rules and policies to ensure equal opportunity in the wire communications services. The ruling's effects, however, are not confined to the Commission and those who would be excluded by licensees' discriminatory or insular recruitment practices. As it stands, no other government agency whose rules are subject to review in that circuit will be able to assert authority through the adoption of regulations of general application, where all a challenger need do to defeat the regulations before they are applied is to put forth the hypothetical and remote case of unconstitutionality.

WHEREFORE, based upon the foregoing, petitioner prays that a writ of certiorari be issued for the review and reversal of the lower court decision and for a remand for a consideration of those claims made by petitioner which were dismissed as moot by that court.

Respectfully submitted,

Shelby D. Green
78 No Broadway
White Plains, N.Y. 10603
(914) 422-4421

Counsel of Record for Petitioner

Dated: October 17, 2001

Supreme Court, U.S.
FILED
DEC 26 2001

Nos. 01-639 and 01-662

In the Supreme Court of the United States

MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL, ET AL., PETITIONERS

v.

MD/DC/DE BROADCASTERS ASSOCIATION, ET AL.

OFFICE OF COMMUNICATION, INC., UNITED CHURCH OF CHRIST, PETITIONER

v.

MD/DC/DE BROADCASTERS ASSOCIATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

RALPH F. BOYD, JR.
Assistant Attorney General

MARK L. GROSS
LISA WILSON EDWARDS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

JANE E. MAGO
General Counsel
Federal Communications Commission
Washington, D.C. 20554

QUESTION PRESENTED

Whether the court of appeals erred in declaring "Option B"—an alternate way of complying with the Federal Communications Commission's equal employment opportunity regulations—unconstitutional on its face, based on the theory that broadcasters selecting that option would feel pressure to adopt recruiting practices that could deprive potential job candidates of information concerning job opportunities based on their race.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	12
Conclusion	24

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. *Mineta*, 121 S. Ct. 511 (2001)	24
Billish v. *City of Chicago*, 962 F.2d 1269 (7th Cir. 1992), cert. denied, 510 U.S. 908 (1993)	23
Contemporary Media, Inc. v. *FCC*, 214 F.3d 187 (D.C. Cir. 2000), cert. denied, 121 S. Ct. 1355 (2001)	19
Duffy v. *Wolle*, 123 F.3d 1026 (8th Cir. 1997), cert. denied, 523 U.S. 1137 (1988)	22
Ensley Branch, NAACP v. *Seibels*, 31 F.3d 1548 (11th Cir. 1994)	23
Glover v. *United States*, 531 U.S. 198 (2001)	21
International Bhd. of Teamsters v. *United States*, 431 U.S. 324 (1977)	15
Lutheran Church-Missouri Synod v. *FCC*, 141 F.3d 344 (D.C. Cir. 1998)	4, 19, 20, 22
Lutheran Church-Missouri Synod v. *FCC*, 154 F.3d 487 (D.C. Cir. 1998)	4
Members of the City Council v. *Taxpayers for Vincent*, 466 U.S. 789 (1984)	14
National Collegiate Athletic Ass'n v. *Smith*, 525 U.S. 459 (1999)	21
Peightal v. *Metropolitan Dade County*, 26 F.3d 1545 (11th Cir. 1994)	23
Raso v. *Lago*, 135 F.3d 11 (1st Cir.), cert. denied, 525 U.S. 811 (1988)	21

Cases—Continued: Page

South-Suburban Housing Center v. *Greater South Suburban Board of Realtors*, 935 F.2d 868 (7th Cir. 1991), cert. denied, 502 U.S. 1074 (1992) 23
Sussman v. *Tanoue*, 39 F. Supp. 2d 13 (D.D.C. Cir. 1999) 20
Texas v. *Cobb*, 531 U.S. 1004 (2000) .....
United States v. *Salerno*, 481 U.S. 739 (1987) 11-12, 14

Statutes and regulations:

Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 634, 98 Stat. 2779 3
Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 3
§ 22(a)(1), 106 Stat. 1498 3
§ 22(f), 106 Stat. 1499 3
47 U.S.C. 301 19
47 U.S.C. 303 (1994 & Supp. V 1999) 19
47 U.S.C. 307 (1994 & Supp. V 1999) 19
47 U.S.C. 308 (1994 & Supp. V 1999) 19
47 U.S.C. 312 19
47 U.S.C. 334(a) 3, 21
47 U.S.C. 334(a)(1) 3
47 U.S.C. 554(b) 3
47 U.S.C. 554(c)(5) 3
29 C.F.R. 1602.7 15
41 C.F.R. 60-2.11 to 60-2.15 15
47 C.F.R. 73.2080 4
Section 73.2080(c) 5
Section 73.2080(c)(1) 5
Section 73.2080(c)(1)(ii) 5
Section 73.2080(c)(2) 5, 6
Section 73.2080(c)(2)(iii) 6
Section 73.2080(c)(2)(xii) 6
Section 73.2080(c)(2)(xiii) 6
Section 73.2080(c)(5) 6

Regulation—Continued: Page

Section 73.2080(d) 5, 6
Section 73.2080(d)(1) 7
Section 73.2080(d)(2) 7

Miscellaneous:

H.R. Rep. No. 934, 98th Cong., 2d Sess. (1984) 3
FCC Proposes New Equal Employment Opportunity (EEO) Rules of Broadcast and Cable, MM Docket No. 98-204 (Dec. 12, 2001) 18
Memorandum Opinion and Order, *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 15 FCC Rcd 22,548 (2000) 8
Report and Order, *Review of the Commissoin's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 15 FCC Rcd 2329 (2000) 4, 5, 6-7, 12-13, 15-16
Amendment of Part VI of FCC Forms 301, 303, 309, 311, 314, 315, 340 and 342, 32 F.C.C.2d 708 (1971) 2
Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices:
18 F.C.C.2d 240 (1969) 2
23 F.C.C.2d 430 (1970) 2

In the Supreme Court of the United States

No. 01-639

MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL, ET AL., PETITIONERS

v.

MD/DC/DE BROADCASTERS ASSOCIATION, ET AL.

No. 01-662

OFFICE OF COMMUNICATION, INC., UNITED CHURCH OF CHRIST, PETITIONER

v.

MD/DC/DE BROADCASTERS ASSOCIATION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 236 F.3d 13. The opinion of the court of appeals on denial of rehearing (Pet. App. 20a) is reported at 253 F.3d 732.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2001, and rehearing was denied on June 19, 2001. On September 12 and 13, 2001, the Chief Justice

extended the time within which to file the petitions for a writ of certiorari to and including October 17, 2001, and the petitions were filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the validity of certain equal employment opportunity (EEO) rules promulgated by the Federal Communications Commission (FCC or Commission) in February of 2000. Those rules are designed to prevent discriminatory hiring practices by broadcast licensees, and to eliminate recruitment practices that operate to exclude or disadvantage potential job applicants on the basis of race or gender.

1. The FCC first began administering EEO responsibilities with respect to its broadcast licensees in 1969, when it adopted rules that prohibited licensees from discriminating on the basis of race, and that required licensees to establish, maintain, and carry out continuing programs to assure equal employment opportunity in every aspect of their employment policies and practices. See *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 18 F.C.C.2d 240 (1969). Over the years, the FCC has adopted additional rules to prevent discrimination in recruitment, selection and hiring, placement and promotion, and has extended those rules to prevent discrimination on the basis of gender. See *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 23 F.C.C.2d 430 (1970); *Amendment of Part VI of FCC Forms 301, 303, 309, 311, 314, 315, 340 and 342*, 32 F.C.C.2d 708 (1971).

The FCC's authority to promulgate EEO regulations derives from various federal statutes that prohibit FCC

licensees from discriminating in their employment practices and require them to adopt "positive recruitment, [job] training" and other measures to ensure "equality of opportunity." 47 U.S.C. 554(b) and (c)(5); 47 U.S.C. 334(a)(1). In 1984, Congress enacted EEO requirements applicable to cable television systems. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 634, 98 Stat. 2779 (1984) (Pet. App. 269a). That statute was, according to its legislative history, designed to "codif[y] and strengthen[] the Commission's existing equal employment opportunity regulations." H.R. Rep. No. 934, 98th Cong., 2d Sess. 86 (1984). In 1992, Congress codified the FCC's EEO requirements for broadcast television licensees, and extended EEO requirements to all other multichannel video programming distributors. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1498 (1992) (1992 Cable Act) (Pet. App. 276a). Congress found that, notwithstanding "regulations governing equal employment opportunity, women and minorities are not employed in significant numbers in positions of management authority in the cable and broadcast television industries," and that "rigorous enforcement of equal employment opportunity rules and regulations is required in order to effectively deter racial and gender discrimination." 1992 Cable Act, § 22(a)(1), 106 Stat. 1498 (Pet. App. 276a-277a). Congress also declared that the FCC "shall not revise" its equal employment opportunity rules applicable to television broadcast station licensees. 1992 Cable Act, § 22(f), 106 Stat. 1499 (codified as 47 U.S.C. 334(a)) (Pet. App. 279a-280a).

2. In 1997, the FCC determined that the hiring practices of one of its licensees, Lutheran Church-Missouri Synod, may have violated the Commission's EEO

regulations relating to community outreach. Lutheran Church sought review of the FCC's decision and challenged the constitutionality of the FCC's EEO outreach rules. In *Lutheran Church-Missouri Synod* v. *FCC*, 141 F.3d 344 (D.C. Cir. 1998), the court of appeals determined that the FCC's use of numeric processing guidelines and numeric measurements for analyzing racial and gender employment data "extend[ed] beyond outreach efforts" and "create[d] a strong incentive [for broadcasters] to meet * * * numerical goals." *Id.* at 353, 356. The court held that the "entire scheme" of the EEO outreach rules was "built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional representation" based on the racial composition of the surrounding community. *Id.* at 351-352. The court held that the EEO rules were unconstitutional because they were not narrowly tailored to advance a compelling governmental interest. *Id.* at 350-356.[1]

On February 2, 2000, the FCC released revised EEO rules in response to the court of appeals' *Lutheran Church* decision. See Report and Order, *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 15 FCC Rcd 2329 (2000) (Pet. App. 49a) (*EEO Report and Order*); 47 C.F.R. 73.2080 (Pet. App. 37a-48a). Those rules focused on recruitment efforts, rather than hiring

---

[1] The court denied a petition for rehearing. *Lutheran Church-Missouri Synod* v. *FCC*, 154 F.3d 487 (D.C. Cir. 1998). The panel stated that the FCC's use of "numerical norms based on proportional representation * * * is the aspect of the Commission's rule that makes it impossible for us to apply any standard of review other than strict scrutiny." *Id.* at 492. The full court declined to rehear the case en banc, with three judges dissenting. *Lutheran Church-Missouri Synod* v. *FCC*, 154 F.3d 494 (D.C. Cir. 1998).

decisions, and eliminated the use of numerical norms that the court of appeals disfavored. See *EEO Report and Order*, 15 FCC Rcd at 2412, ¶ 211 n.336 (Pet. App. 207a n.336). Instead, "[u]nder the new rule," licensees would "not be required to compare the racial composition of their employment profile with the racial composition of the labor force in their communities, and the Commission would not make that comparison in processing renewal applications." *Id.* at 2412, ¶ 211 (Pet. App. 207a). Because of that change, the FCC concluded that "the new rules would not indirectly pressure employers to make race-based hiring decisions contrary to the *Lutheran Church* decision." *Ibid.*

The revised rules provided new methods for licensees to document recruitment efforts, and established two ways for broadcasters to achieve compliance. 47 C.F.R. 73.2080(c)(1), (c)(2) and (d) (Pet. App. 38a-40a, 43a-44a). See also *EEO Report and Order*, 15 FCC Rcd at 2363-2365, ¶¶ 77-78 (Pet. App. 113a-116a). In all circumstances, licensees were required to disseminate widely information concerning each full-time job vacancy. *EEO Report and Order*, 15 FCC Rcd 2364, ¶ 78 (Pet. App. 113a). In addition, licensees were required to engage in outreach activities, consistent with one of two alternate approaches, known as Option A (47 C.F.R. 73.2080(c)), and Option B (47 C.F.R. 73.2080(d)). See *EEO Report and Order*, 15 FCC Rcd 2364-2365, ¶ 78 (Pet. App. 114a-116a). Under Option A, licensees could fully comply without considering or documenting race or gender in any recruitment activity. Instead, Option A required licensees to recruit for every job vacancy by providing notification of the vacancy to any recruitment organization that requests such notice, 47 C.F.R. 73.2080(c)(1)(ii) (Pet. App. 39a), and to participate in two to four additional recruitment activities every two

BEST AVAILABLE COPY

years (depending on the number of full-time employees at the station), 47 C.F.R. 73.2080(c)(2) (Pet. App. 39a-40a). The additional recruitment activities could be selected from a non-exclusive menu of options that included participation in job fairs and job banks, establishment of scholarship and in-house training programs, and participation in community events related to employment opportunities in the industry. *Ibid.* See also *EEO Report and Order*, 15 FCC Rcd at 2372-2374, ¶¶ 99-103 (Pet. App. 129a-133a).[2] In addition, licensees could choose, instead of the specifically listed options, to conduct "other activities * * * reasonably calculated to further the goal of disseminating information as to employment opportunities in broadcasting to candidates who might otherwise be unaware of such opportunities." 47 C.F.R. 73.2080(c)(2)(xiii) (Pet. App. 40a). See also *Report and Order*, 15 FCC Rcd at 2374, ¶ 102 (Pet. App. 132a). Licensees selecting Option A were required to maintain records documenting compliance, but did not need to report racial data in so doing. 47 C.F.R. 73.2080(c)(5) (Pet. App. 41a-42a).

At the request of several licensees, the Commission also gave broadcasters an alternative—Option B—under which they could forgo the additional recruitment measures set out in Option A and design their own outreach programs instead. See 47 C.F.R. 73.2080(d) (Pet. App. 43a). See also *EEO Report and*

---

[2] Only two of the thirteen listed recruitment measures involved special attention for women and minorities. Those two measures provided that a licensee may "co-sponsor[] at least one job fair with" or list "each upper-level category opening in a job bank or newsletter of" entities whose "membership includes a substantial participation of women and minorities." 47 C.F.R. 73.2080(c)(2)(iii) and (xii).

Order, 15 FCC Rcd at 2365, 2374, ¶¶ 78, 104 (Pet. App. 115a-116a, 133a-134a). Licensees electing Option B were required to demonstrate that their outreach programs result in wide dissemination of information on job vacancies and to maintain "data reflecting the recruitment source, gender, and racial and/or ethnic status of applicants for each full-time job vacancy filled by the station employment unit." See 47 C.F.R. 73.2080(d)(1) (Pet. App. 43a). In addition, licensees choosing Option B were required to report "data reflecting, for each recruitment source utilized for any full-time vacancy during the preceding year, the total number of applicants generated by that source, the number of applicants who were female, and the number of applicants who were minority, identified by the applicable racial and/or ethnic group with which each applicant is associated." 47 C.F.R. 73.2080(d)(2) (Pet. App. 43a-44a).

With respect to the data collection component of Option B, the FCC stated that "there is no requirement that the composition of applicant pools be proportionate to the composition of the local work force." *EEO Report and Order*, 15 FCC Rcd at 2378, ¶ 120 (Pet. App. 142a). "The only purpose of the data collection is to give the broadcaster, the public, and the Commission more information by which to monitor the effectiveness of a station's outreach efforts so that the broadcaster can take appropriate action to modify its outreach efforts should the information indicate that they are not reaching the entire community." *Id.* at 2378-2379, ¶ 120 (Pet. App. 143a). The FCC also stated that Option B was designed merely to give broadcasters an opportunity to design their own program and that it was not necessary to the FCC's EEO program; if Option B were invalidated, the FCC noted, it should be severed from

the remainder of the regulation. See Memorandum Opinion and Order, *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 15 FCC Rcd 22,548, 22,555, ¶ 22 & n.19 (2000).

3. Following the FCC's issuance of its revised EEO rules, various parties, including the Office of Communication, Inc., United Church of Christ (UCC) (petitioner in No. 01-662), sought review in the Court of Appeals for the District of Columbia Circuit. The Minority Media and Telecommunications Council (MMTC) and National Organization for Women (NOW) (petitioners in No. 01-639) intervened to defend the FCC's EEO rules.

Following briefing and argument, the court of appeals granted the petitions for review and vacated the FCC's rules. The court first held Option A to be constitutional. Pet. App. 9a. Under Option A, the court pointed out, a licensee did not need to report the race or gender of job applicants or interviewees. Instead, the applicant could select from a list of 13 special recruiting devices. "Because * * * licensees remain free under Option A to select recruitment measures that do not place a special emphasis upon the presence of women and minorities in the target audience," the court concluded, "we do not believe the Broadcasters are meaningfully pressured under Option A to recruit women and minorities." Pet. App. 9a-10a.

The court of appeals, however, held Option B to be unconstitutional. The court first found that Option B put "pressure [on licensees] to focus recruiting efforts upon women and minorities." Pet. App. 10a. The court stated that, under Option B, licensees were required to report the race and gender of each applicant so that the FCC could determine whether a licensee's recruitment

efforts have reached the "entire community." *Ibid.* The court stated that the FCC would "investigate the broadcaster's recruitment efforts" "[i]f a licensee reports 'few or no' women and minorities in its applicant pool." *Ibid.* The potential for "[i]nvestigation by the licensing authority is a powerful threat," the court stated, and is "almost guaranteed" to make licensees "focus their recruiting efforts upon women and minorities, at least until those groups generate a safe proportion of the licensee's job applications." *Id.* at 11a, 11a-12a. The FCC's use of job applications generated by outreach to gauge effectiveness, instead of the nature of the outreach itself, the court also stated, "is evidence that the agency with life and death power over the licensee is interested in results, not process, and is determined to get them." *Id.* at 11a.

The court also found that the "pressure" to generate minority and female applicants allegedly created by Option B would result in disparate treatment of potential applicants based on race. Option B, the court stated, "compel[s] broadcasters to redirect their necessarily finite recruiting resources so as to generate a larger percentage of applications from minority candidates." Pet. App. 13a-14a & n.***. The court hypothesized that, because of that redirection of resources, "some prospective non-minority applicants who would have learned of job opportunities but for the Commission's directive now will be deprived of an opportunity to compete simply because of their race." *Id.* at 14a. The court therefore held that the FCC's program must be reviewed under the strict scrutiny standard applicable to racial classifications. *Ibid.*

The court concluded that Option B does not survive strict scrutiny because it is not narrowly tailored to the FCC's asserted interest in preventing discrimination.

Pet. App. 15a. The court reasoned that there is no basis for pressuring a broadcaster to recruit minorities absent a "predicate finding" that the particular broadcaster had discriminated or was likely to discriminate against minorities. *Id.* at 16a. The court also concluded that Option B's requirement that licensees document the race of each job applicant "is relevant to the prevention of discrimination only if the Commission assumes that minority groups will respond to non-discriminatory recruitment efforts in some predetermined ratio, such as in proportion to their percentage representation in the local workforce." *Ibid.* Such an assumption, the court observed, "stands in direct opposition to the guarantee of equal protection." *Ibid.* Thus, the court concluded that the data required under Option B "are not probative on the question of a licensee's efforts to achieve 'broad outreach,' much less narrowly tailored to further the Commission's stated goal of non-discrimination in the broadcast industry." *Id.* at 16a-17a.

Finally, the court held that the FCC's EEO rules had to be vacated in their entirety, because Option B is not severable from Option A. Pet. App. 17a-18a. The court agreed that the FCC "clearly intend[ed] that the regulation be treated as severable, to the extent possible." *Ibid.* But the court concluded that the FCC's EEO rules could not function sensibly without Option B. *Id.* at 17a-18a. The court observed that the FCC's intent was to give licensees flexibility by offering two means of complying, *id.* at 17a, and therefore concluded that eliminating one of those means "would undercut the whole structure of the rule" by giving licensees only a single option, *id.* at 17a-18a.

4. The court denied petitions for rehearing and rehearing en banc. Pet. App. 26a. On rehearing, the

panel issued a supplemental opinion to respond to the FCC's argument that Option B should have been severed from the rest of the FCC's EEO rules.[3] Although the Commission argued that its orders and briefs had made its preference for severance clear, the court again concluded that it was not appropriate to preserve Option A while severing Option B. *Id.* at 22a-24a. The FCC order under review, the court stated, "had two goals—ensuring broad outreach and affording flexibility." *Id.* at 24a. Because Option B had been provided to afford broadcasters flexibility, the court stated, it played "an integral part in the Commission's evaluation of the rule as a whole," and "the Commission never once considered the implications of promulgating an EEO rule without Option B." *Id.* at 25a. The court therefore held that leaving the Commission's EEO outreach rules in place shorn of Option B "without further consideration * * * would leave in force a rule that, in view of the Commission's own stated goals, would be arbitrary and capricious." *Id.* at 26a.

Judge Tatel, joined by two other judges, dissented from the denial of rehearing en banc. Pet. App. 27a-36a. Judge Tatel disagreed with the panel's conclusion that the Commission's EEO regulations are subject to strict scrutiny. Because this case involves a facial challenge to the FCC's regulations, Judge Tatel explained, the regulations must be upheld unless "no set of circumstances exists under which" the regulations "would be valid." Pet. App. 27a (quoting *United States* v. *Salerno*, 481 U.S. 739 (1987)). Here, he observed, the court had

---

[3] Petitioners sought rehearing and rehearing en banc. The FCC and the United States sought panel rehearing on the court's decision not to sever Option B from the remainder of the FCC's EEO rules. See Pet. App. 21a n.1.

invalidated the FCC's regulation by speculating about hypothetical scenarios that might render the rule unconstitutional in application. *Ibid.* In particular, the court had hypothesized that the Commission would enforce the rule in a manner that pressures broadcasters into generating applicant pools with the same racial composition as the local community, even though the Commission had expressly declared that it would not do so. *Id.* at 27a-28a. See also *id.* at 30a-31a. And the court had hypothesized that requiring broader dissemination to reach "the entire community" would necessarily "reduce the number of white males receiving job information," a result that was hardly inevitable. *Id.* at 29a. See also *id.* at 31-32a. "Because there exist 'circumstances . . . under which' broadcasters can comply with Option B with no adverse effect on white males," Judge Tatel concluded, "the broadcasters' facial challenge should have failed." *Id.* at 29a. Instead, the broadcasters should have been left to bring an "as applied challenge when and if the Commission applies the rule in a discriminatory manner." *Ibid.*

Judge Tatel also concluded that the court should have severed Option B from the remainder of the FCC's EEO rules. Pet. App. 32a-36a. The agency, Judge Tatel emphasized, had intended for the two options to be severable, and "[a]gency intent has always been the touchstone of [the] inquiry into whether an invalid portion of a regulation is severable." *Id.* at 33a.

ARGUMENT

This case concerns the constitutionality of the equal employment opportunity (EEO) outreach rules promulgated by the Federal Communications Commission (FCC or Commission) in February 2000. See Report and Order, *Review of the Commission's Broadcast and*

Cable Equal Employment Opportunity Rules, 15 FCC Rcd 2329 (2000) (*EEO Report and Order*) (Pet. App. 49a). The court of appeals upheld the most important feature of those rules, reflected in Option A, as constitutional. However, the court also concluded that an alternative provided by those rules—Option B, which established an alternate method of complying with EEO outreach obligations—was subject to strict scrutiny and unconstitutional on its face. As a result, the court vacated the FCC's EEO outreach rules in their entirety and remanded the matter to the FCC for further consideration.

Although the court of appeals misapplied the standard for resolving facial constitutional challenges, and erred in its severance analysis, further review is not warranted. The FCC has contended throughout this litigation that it can satisfy its statutory EEO obligations through Option A alone. Although the court of appeals erroneously failed to sever (and thereby preserve) Option A when it struck down Option B, the proper remedy for that mistaken severance decision is for the FCC to promulgate new regulations that omit the provisions held unconstitutional by the court of appeals. The FCC has already noticed such replacement rules.

The court of appeals' decision, moreover, does not announce any broad principles of law; it merely misapplies settled standards to the particular facts of this case. Nor is it clear that the decision will have a significant impact in future cases. In fact, because the decision appears to rest on agency-specific concerns and factual assumptions that will not bind future panels—panels that will review different regulations, potentially issued by different agencies, in different circumstances, and on different factual records—it may prove to have

little effect beyond this case. Finally, the decision does not create a division in circuit authority. Accordingly, further review is not warranted.

1. As this Court has explained, a party bringing a facial challenge to the constitutionality of a statute or regulation bears a heavy burden. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). "The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.* at 745. Instead, a statute or regulation is invalid on its face only when it is "apparent that" the statute or regulation "could *never* be applied in a valid manner." *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 797-798 (1984) (emphasis added).

In this case, the court of appeals held that one alternate method of complying with the FCC's EEO rules, known as Option B, was subject to strict scrutiny and unconstitutional on its face. In reaching that conclusion, the court of appeals in essence made factual findings regarding the manner in which the FCC would enforce the regulations and the effect that such enforcement would have on licensee behavior. First, the court found that the record-keeping requirements imposed by Option B—that licensees must report the race, gender, and source of referral for each applicant for employment—will pressure licensees to focus recruiting efforts on women and minorities in order to generate applications from those groups; that was true, the court stated, because the FCC would investigate licensees if the data showed significant disparities. Pet. App. 10a-12a (data collection and threat of investigation "almost guaranteed" to make licensees "focus their recruiting efforts upon women and minorities, at least until those groups generate a safe proportion of the

licensee's job applications"). Second, the court found that such pressure would cause licensees to focus their "necessarily finite recruiting resources" on generating a larger percentage of minority applicants, and thus would divert resources from providing notice to nonminority applicants. *Id.* at 13a-14a. As a result, the court found, the Commission's regulations will deprive nonminority candidates of the opportunity to compete for openings on account of their race. *Id.* at 14a n. ***.

We agree with petitioners that speculation about how the FCC might enforce its regulations is not a proper basis for striking down those regulations on their face, particularly in the absence of any supportive record evidence. See MMTC/NOW Pet. (No. 01-639), at 16-21. The use of statistical imbalances as a means of identifying potentially discriminatory practices is well established, *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 340 n.20 (1977); MMTC/NOW Pet. 22-23 (citing additional authorities), and many agencies collect such data to ensure compliance with nondiscrimination requirements. See, *e.g.*, 29 C.F.R. 1602.7 (EEOC regulations), and 41 C.F.R. 60-2.11 to 60-2.15 (Department of Labor regulations). Here, there is no basis for finding that the FCC would use such data and its enforcement powers in a manner that pressures licensees to achieve racial proportionality in recruiting. The FCC, after all, has specifically declared that "there is no requirement that the composition of applicant pools be proportionate to the composition of the local work force," and has disavowed any intent of relying on statistical data in isolation. See *EEO Report and Order*, 15 FCC Rcd at 2378, ¶ 120 (Pet. App. 142a). "The only purpose of the data collection," the FCC explained, "is to give the broadcaster, the public, and the Commission *more information* by which to monitor the effec-

tiveness of a station's outreach efforts so that the broadcaster can take appropriate action to modify its outreach efforts should the information indicate that they are not reaching the entire community." *Id.* at 2378-2379, ¶ 120 (Pet. App. 143a) (emphasis added).[4]

Similarly, we agree with petitioners that the court of appeals should not have assumed that, by requiring licensees to reach out to the entire community, the FCC's rules would deprive one particular part of the community—nonminorities—of job-availability information they otherwise would have received. The distribution of information about job openings is not necessarily a zero-sum game in which providing the information to one group automatically results in the exclusion of others. To the contrary, some means of distributing notice (postings in the community, electronic notices, use of publications with broader circulation to all groups) may increase the reach of notice to all, particularly when compared to other (*e.g.*, informal and word-of-mouth) methods. See Pet. App. 29a (Tatel, J., dissenting from denial of rehearing en banc).

Of course, if the difficulties identified by the court of appeals in fact were to arise in a particular case, that might raise serious constitutional concerns and provide grounds for an as-applied challenge. But mere speculation about such hypothetical events is not a proper basis for striking down a regulation *on its face*. In that respect, the court of appeals misapplied settled

---

[4] It is also hard see how the FCC's collection of data could be thought to *pressure* broadcasters to recruit minorities over nonminorities. After, all broadcasters remain subject to a nondiscrimination requirement. Broadcasters concerned about collecting and reporting data on the identity of applicants also could avoid collecting such data by selecting Option A, which has no data collection requirements, instead of Option B.

law governing the disposition of facial constitutional challenges.

2. The misapplication of settled law to a particular set of facts, however, is not the sort of matter that ordinarily warrants this Court's review. The court of appeals did not make any broad pronouncements regarding how facial challenges should be adjudicated. It did not hold that courts must or should make questionable factual assumptions about how a regulation will be applied. Nor did it hold that a regulation can be unconstitutional on its face even though it is capable of constitutional application. Instead, the court made the apparently case-specific error of relying on inappropriate factual assumptions in the context of this case.

Further review of that case-specific error is neither necessary nor appropriate. As an initial matter, the effect on the FCC's enforcement efforts is unlikely to be significant. To the contrary, the FCC has determined that it can meet its statutory EEO obligations even without the use of Option B. In the petition for panel rehearing below, the FCC called the court's attention to language in its orders making clear that it "did not view Option B as essential to achieving its goal of ensuring that broadcasters engage in broad outreach in recruiting new employees." FCC Petition for Rehearing at 3. The FCC explained that Option B had been "adopted at the request of broadcasters to provide them with additional flexibility," and that Option A would be more than adequate to permit the FCC to ensure that broadcasters broadly advertise job vacancies. *Ibid.* Although the court of appeals erroneously rejected the FCC's severance analysis, the clear remedy for that lies in the FCC's repromulgation of its rules without the optional provision held unconstitutional by the decision below. To that end, the FCC

recently announced its adoption of a Second Notice of Proposed Rule Making, in which the Commission proposes repromulgating Option A without Option B, together with certain other conforming changes. *See FCC Proposes New Equal Employment Opportunity (EEO) Rules for Broadcast and Cable*, MM Docket No. 98-204 (Dec. 12, 2001). Indeed, it is precisely because the FCC can fully achieve its EEO objectives without Option B and that option's record-keeping requirements that the FCC declined to seek further review. Consequently, the case does not present an issue of programmatic significance warranting this Court's review.

Moreover, far from establishing a broad precedent regarding the nature of facial challenges or the permissibility of data collection requirements, the court of appeals' decision rests primarily on putative facts that are potentially unique to this case and context. For example, even though the FCC's data collection rules do not require licensees to ensure that their applicant pools reflect the racial composition of the local community—and the FCC has disavowed any such requirement— the court of appeals found that licensees would still feel pressure to achieve such a result. That was true, the court found, because the FCC "has a long history of employing" a "variety of sub silentio pressures and 'raised eyebrow' regulation," Pet. App. 10a, and had "promise[d] to investigate any licensee that reports 'few or no' applications from women or minorities," *id.* at 11a. Such an investigation, the court found, is a "powerful threat, almost guaranteed to induce" licensees "to focus their recruiting efforts upon women and minorities, at least until those groups generate a safe proportion of the licensee's job applications." *Id.* at 11a, 11a-12a. The threat was particularly powerful, the court also suggested, given the FCC's supposed "life

and death power over the licensee," *i.e.*, the fact that an FCC decision denying renewal of or revoking a station's license will preclude that station's further operation and may put the broadcaster out of business. *Id.* at 11a. See also *Contemporary Media, Inc.* v. *FCC*, 214 F.3d 187 (D.C. Cir. 2000), cert. denied, 121 S. Ct. 1355 (2001).[5] Further, the court of appeals found that licensees would respond to the FCC's "pressure" by focusing resources on recruiting minorities and diverting resources from the recruitment of white males. Pet. App. 13a-14a & n.***.[6]

Of course, we disagree with each of those assertions. There is no reason to believe that the FCC would enforce its EEO guidelines in an unconstitutional fashion (*sub silentio* or otherwise). Nonetheless, no matter how questionable the court's factual suppositions may have been, they were *critical* to the court of

---

[5] Under the Communications Act, the FCC has the responsibility of controlling radio and television channels and the power to license their use for limited periods of time. 47 U.S.C. 301. The FCC establishes qualifications for broadcasters, can compel the disclosure of certain information from them, and may grant or deny license applications in the public interest. 47 U.S.C. 303, 307, & 308 (1994 & Supp. V 1999). The FCC may alter, suspend, or revoke a license subject to certain procedural safeguards. 47 U.S.C. 312.

[6] The court of appeals' skepticism also appears to have been influenced by its view of the FCC's earlier regulatory efforts in this area. The court invalidated the FCC's predecessor regulations in *Lutheran Church-Missouri Synod* v. *FCC*, 141 F.3d 344 (D.C. Cir. 1998), because they were "built on the notion that stations should aspire to a workforce that attains, or at least approaches, proportional representation," *id.* at 352, and had been criticized by the Justice Department for that very reason, *id.* at 353 (noting Justice Department concern that prior regulations operated as a "*de facto* hiring quota").

appeals' decision and, as a result, may render the decision *sui generis*. Indeed, precisely because the court's decision rests on what are, in essence, findings of fact regarding the nature of the program, its enforcement, and its likely effects, the decision is unlikely to bind future panels to any particular result in cases involving different agencies, with different histories, enforcing different compliance programs, on different factual records.[7] Indeed, the District Court for the District of Columbia relied on similar observations in distinguishing *Lutheran Church-Missouri Synod* v. *FCC*, 141 F.3d 344, 351-353 (D.C. Cir. 1998); see note 6, *supra*, and upholding the FDIC's EEO regulations, notwithstanding some similarities between them and the FCC EEO rules invalidated in *Lutheran Church*. *Sussman* v. *Tanoue*, 39 F. Supp. 2d 13, 26 (D.D.C. 1999) (distinguishing FDIC EEO rules because the FCC regulations were thought by the D.C. Circuit to "create pressure on stations to eliminate under-representation through racial preferences" whereas the FDIC's program did "*not* lead to racial preferences"). In other words, the court's critical assumptions in this case—

---

[7] It seems rather unlikely that the court of appeals will be willing to attribute to another agency a practice of using "raised eyebrow" pressure in the absence of record evidence so proving. Similarly, no other regulations are likely to have the sort of historical antecedents that the FCC's had. See note 6, *supra*. Further, it is not common for an agency to have the sort of "life or death" power the court attributed to the FCC. For example, agencies that provide contracting opportunities to private-sector companies, or grants for research projects to private organizations, do not have that kind of power. Most private enterprises can do business without contracting with the federal government. Broadcast licensees, in contrast, must deal with the FCC, because the FCC determines (subject to judicial review) whether or not they can receive or retain their broadcast licenses.

and its ultimate finding that the record-keeping requirement of Option B forces licensees to recruit minorities and women to the exclusion of nonminority males—are factual in nature and thus necessarily limited to this case. They are, furthermore, based on unique characteristics the court imputed to the FCC and the FCC's alleged enforcement practices, making it unlikely that the court's holding will have application beyond the FCC and this particular program.[8]

3. Finally, petitioner UCC is mistaken to assert (UCC Pet. (No. 01-662), at 27-28) that the court of appeals' decision creates a conflict in the circuits. Instead, each case cited by UCC involved distinct facts, and none involved the unique circumstances relied upon by the decision below.

For example, in *Raso* v. *Lago*, 135 F.3d 11, 17 (1st Cir.), cert. denied, 525 U.S. 811 (1998) (cited UCC Pet. (No. 01-662), at 27), the plaintiffs challenged a HUD decision which required certain apartments to be made

---

[8] Petitioners MMTC and NOW also argue that the court of appeals, *sub silentio*, invalidated 47 U.S.C. 334(a), which prohibited the FCC from revising the EEO regulations in existence in 1992 or the forms used by licensees. MMTC/NOW Pet. (No. 01-639) at 25-28. However, as petitioners MMTC and NOW concede (at 27), it was not the decision below that required the FCC to revise its EEO regulations, but the earlier decision in *Lutheran-Church Missouri Synod* v. *FCC*, 141 F.3d 344 (D.C. Cir. 1998); this case merely addressed the validity of the replacement regulations. Moreover, it is not at all obvious that Congress's direction that the FCC "shall not revise" its EEO regulations includes an obligation not to revise them in the face of a decision holding them unconstitutional. The effect of 47 U.S.C. 334(a), in any event, was not passed upon by the court of appeals, and no court has ever addressed it. Accordingly, this Court's review is unwarranted. *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); *Glover* v. *United States*, 531 U.S. 198, 205 (2001).

available to everyone, notwithstanding a state law that would have given preference to displaced residents who were predominantly white. The court found that the plaintiffs had "alleged no facts that, if proven, would reveal any secret discriminatory standard, pattern of past practice, or motive" of distinguishing among applicants based on race. *Id.* at 17. Similarly, there was no suggestion that the agency had an extraordinary power of "life and death." Here, in contrast, the court of appeals attributed a prohibited intent to the FCC (based on a variety of factors) and suggested that the FCC would use its allegedly extraordinary powers to achieve the desired result. See pp. 9, 18-19 & note 5, *supra*; Pet. App. 11a (declaring it "evident" that the FCC "with life and death power over the licensee is interested in 'results,'" (*i.e.*, ensuring racial proportionality in the applicant pool) "not process" (broad outreach), "and is determined to get them."). If *Raso* had arisen in the D.C. Circuit rather than the First Circuit, moreover, it very likely would have been resolved the same way. See *Lutheran Church*, 141 F.3d at 351 n.8 (distinguishing the HUD rulings at issue in *Raso* from the FCC's EEO regulations, because HUD's "racially neutral" requirement "that some of the apartments * * * be opened to all applicants" no "more implicated the equal protection guarantee than a nondiscrimination statute like Title VII").

Duffy v. *Wolle*, 123 F.3d 1026 (8th Cir. 1997), cert. denied, 523 U.S. 1137 (1998) (cited UCC Pet. (No. 01-662) at 27), is similarly distinguishable. In that case, the plaintiff contended that he was the victim of gender discrimination in promotion, and argued that the defendant's use of outreach in recruiting was evidence of its intent to discriminate in promotion. *Id.* at 1038. Thus, there was no claim that the outreach program

itself violated the Constitution; no claim that the agency was coercing race- or gender-conscious decisions through "life-and-death" powers; and no claim that the outreach program *reduced* the scope of outreach to nonminority applicants. To the contrary, the court of appeals concluded that the outreach program there had created "a larger pool of qualified applicants." *Id.* at 1039. *South-Suburban Housing Center* v. *Greater South Suburban Board of Realtors*, 935 F.2d 868 (7th Cir. 1991), cert. denied, 502 U.S. 1074 (1992) (cited UCC Pet. (No. 01-662, at 28) is distinguishable for similar reasons. It did not involve an equal protection challenge—it was a First Amendment challenge—and the outreach program in any event did not "deter" potential buyers based on race, reducing opportunities, but rather "create[d] additional competition in the housing market." 935 F.2d at 884.

The remaining cases cited by petitioner UCC (at 27-28)—*Peightal* v. *Metropolitan Dade County*, 26 F.3d 1545 (11th Cir. 1994); *Ensley Branch, NAACP* v. *Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994); and *Billish* v. *City of Chicago*, 962 F.2d 1269, 1290 (7th Cir. 1992), cert. denied, 510 U.S. 908 (1993)—are similarly inapposite. None of the factual predicates relied on by the decision below (see pp. 18-19, *supra*) were present in those cases. Those cases, moreover, involved the selection of remedies for past discrimination that had been proved, and merely used the label "race neutral" in passing to describe outreach recruiting remedies that were viewed as less drastic than racial preferences in hiring or promotion. Because those cases involved the narrow tailoring of remedies for proven discrimination, they have no bearing on whether, in the absence of proven discrimination and under the facts posited by

the D.C. Circuit in this case, the FCC's EEO outreach regulations would be deemed constitutional.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

RALPH F. BOYD, JR.
Assistant Attorney General

JANE E. MAGO
General Counsel
Federal Communications Commission

MARK L. GROSS
LISA WILSON EDWARDS
Attorneys

DECEMBER 2001

---

[9] Petitioners MMTC and NOW also suggest that the Court hold the petition pending decision in *Adarand Constructors, Inc.* v. *Mineta*, No. 00-730. This Court dismissed the petition for a writ of certiorari in that case as improvidently granted. See 122 S. Ct. 511 (2001). Accordingly, there is no reason to hold this case pending decision in *Adarand*.

Nos. 01-639, 01-662

DEC 26 2001

In The
Supreme Court of the United States

MINORITY MEDIA AND
TELECOMMUNICATIONS COUNCIL, ET AL.,
Petitioners,

v.

MD/DC/DE BROADCASTERS ASSOCIATION, ET. AL.,
Respondents.

OFFICE OF COMMUNICATIONS, INC.;
UNITED CHURCH OF CHRIST,
Petitioners,

v.

MD/DC/DE BROADCASTERS ASSOCIATION, ET. AL.,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION
FOR THE STATE BROADCASTERS ASSOCIATIONS

Richard R. Zaragoza
Kathryn R. Schmeltzer
Barry H. Gottfried
Counsel of Record
Elizabeth B. Wydra
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037-1128
(202) 663-8000

Counsel for Respondents
State Broadcasters Associations

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

QUESTION PRESENTED

Whether the court of appeals correctly vacated the Federal Communications Commission's so-called "Equal Employment Opportunity Rule" because it was a race-based classification that violated the Fifth Amendment and the unconstitutional provisions could not be severed to leave a rule that fulfilled its intended purposes.

CORPORATE DISCLOSURE STATEMENT

Respondents State Broadcasters Associations, with the exception of the Georgia Association of Broadcasters, are all non-profit, incorporated trade associations comprised of broadcast station members. The Georgia Association of Broadcasters is an incorporated, for-profit trade association. None of the State Associations has issued any share or debt securities to the public. No parent company or publicly-held company has an ownership interest in any of the State Associations.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 4

I. The FCC has initiated a rule making to implement its "equal opportunity" objective in a constitutional manner and is not hindered in its ability to pursue any lawful mandate 5

II. The court of appeals' decision does not interfere with the ability of other government agencies to enforce regulations. 5

III. The court of appeals' invalidation of the EEO rule on its face comports with Court precedent and Petitioners have identified no circuit court split on this issue requiring resolution 7

IV. This Court does not grant certiorari to review the specific evidence and facts necessary to a disposition of the severance issue in this case 9

V. The Court's dismissal of *Adarand Constructors, Inc. v. Mineta* renders moot Petitioners' arguments relating to *Adarand*'s disposition..... 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases **Page(s)**

Adarand Constructors, Inc. v. Slater,
228 F.3d 1147 (10th Cir. 2000),
cert. dismissed sub nom.,
Adarand Constructors, Inc. v. Mineta,
70 U.S.L.W. 4025 (U.S. Nov. 27, 2001)
(No. 00-730) 4, 10

Bigelow v. Virginia,
421 U.S. 809 (1975) 8

City of Chicago v. Morales,
527 U.S. 41 (1999) 7

Community-Service Broad. of Mid-America, Inc. v. FCC,
593 F.2d 1102 (D.C. Cir. 1978) 3

General Talking Pictures Corp. v. Western Elec. Co.,
304 U.S. 175 (1938) 9

Head v. New Mexico Bd. of Exam'rs in Optometry,
374 U.S. 424 (1963) 6

K-Mart Corp. v. Cartier, Inc.,
486 U.S. 281 (1988) 3, 9

Lutheran Church-Missouri Synod v. FCC,
141 F.3d 344, *reh'g denied*,
154 F.3d 487, *reh'g en banc denied*,
154 F.3d 494 (D.C. Cir. 1998) 1, 2

MD/DC/DE Broadcasters Ass'n v. FCC,
236 F.3d 13, *reh'g & reh'g en banc denied*,
253 F.3d 732 (D.C. Cir. 2001) ..... *passim*

Planned Parenthood v. Casey,
505 U.S. 833 (1992) 8

Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding, Report and Order,
MM Docket Nos. 96-16, 98-204,
15 F.C.C. Rcd. 2329 (2000) 2, 3

Texas v. Mead,
465 U.S. 1041 (1984) 9

United States v. Johnston,
268 U.S. 220 (1925) 9

United States v. Salerno,
481 U.S. 739 (1987) 7

CONSTITUTIONAL PROVISION

U.S. Const. amend. V 3, 10

STATUTE

47 U.S.C. 334(a) 5

REGULATIONS

47 C.F.R. § 73.2080(c)(2) 2

47 C.F.R. § 73.2080(d)(2) 2

OTHER AUTHORITY

Press Release, Federal Communications Commission, FCC Proposes New Equal Employment Opportunity (EEO) Rules for Broadcast and Cable (December 13, 2001), *available at* http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2001/nrmm0117.html 1, 5

STATEMENT OF THE CASE

1. The court of appeals correctly ruled that the FCC's so-called "equal employment opportunity" rule (the "EEO rule") was a race-based classification that violated the Fifth Amendment. *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, *reh'g & reh'g en banc denied*, 253 F.3d 732 (D.C. Cir. 2001) (Pet. App. 1a). Neither the Federal Communications Commission ("FCC") nor the United States of America has requested review of that ruling. Indeed, in the wake of the court of appeals' decision, the FCC has adopted a Second Notice of Proposed Rulemaking seeking comments on a proposed new EEO rule. *See* Press Release, Federal Communications Commission, FCC Proposes New Equal Employment Opportunity (EEO) Rules for Broadcast and Cable (December 13, 2001), *available at* http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2001/nrmm0117.html. By initiating the rulemaking, the FCC indicates that it can formulate a new rule that will serve the agency's purposes and comply with the Constitution.

2. The Petitioners, most of which were intervenors in the court of appeals, do not seek review of the Fifth Amendment issue that was the focal point of the parties' arguments and the court of appeals' decision below. Rather, they present to this Court an issue relating to the standards for a facial challenge to the EEO rule, an issue that was never raised by any party prior to the court of appeals' initial ruling and was raised only cursorily on rehearing in the court of appeals by one of the Petitioners.

3. The facts leading to the court of appeals' decision are as follows. In *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, *reh'g denied*, 154 F.3d 487, *reh'g en banc denied*, 154 F.3d 494 (D.C. Cir. 1998), the court of appeals held that an earlier version of the FCC's EEO rule was an unconstitutional race-based classification because it pressured broadcasters to hire employees based on race and

could not survive strict scrutiny. Neither the FCC, the United States, nor any other party sought review by the Court.

On remand of *Lutheran Church*, the FCC initiated a rule-making proceeding to remedy the constitutional flaws identified by the court of appeals. In response, the State Associations submitted a proposal to the FCC that would have provided for broad outreach in recruitment to the entire public, without any reference to the race, ethnicity or gender of applicants or employees. The FCC rejected this proposal and adopted instead a new EEO rule that not only re-imposed on broadcasters many of the same race, ethnicity and gender-based affirmative action and reporting requirements contained in the prior rule, but also added new burdensome requirements. *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, Report and Order, MM Docket Nos. 96-16, 98-204, 15 F.C.C. Rcd. 2329 (2000) (the "*EEO R&O*") (Pet. App. 49a).

The exclusive focus of the new EEO rule was on "women and minorities", *not*, as Petitioners suggest, on the "entire community." Pet. 17. Race, ethnicity and gender were the *only* traits that the new rule referenced in the recruitment procedures it imposed on broadcasters. *See EEO R&O* at ¶¶ 78-9, 104 (Pet. App. 113a-117a, 134a); 47 C.F.R. § 73.2080(d)(2) (Pet. App. 43a-44a). The new EEO rule was concerned only with certain classes of people on whom the FCC chose to bestow a special status – classes defined by racial, ethnic and gender classifications. *See, e.g., EEO R&O* at ¶ 113 (Pet. App. 138a); 47 C.F.R. § 73.2080(c)(2)(iii), (xii) (Pet. App. 39a-40a). The rule did not require stations to maintain data reflecting whether recruitment sources generated applicants who were, for example, members of particular religious groups, or who were from particular socioeconomic backgrounds; rather, it required the maintenance of data with respect *only* to race, ethnicity and gender in connection with Option B. Moreover, the

FCC warned that it was prepared to investigate broadcasters that reported "few or no" job applications from women or minorities. *See, e.g., EEO R&O* at ¶ 120 (Pet. App. 142a).

4. The court of appeals correctly ruled that the new EEO rule pressured broadcasters into recruiting on the basis of race, and was therefore a race-based classification that violated the equal protection component of the Fifth Amendment's Due Process Clause. *MD/DC/DE Broadcasters*, 236 F.3d 13 (Pet. App. 1a). The court made this decision in the context of its experience with the Commission's long history of pressuring broadcasters to induce conduct desired by the agency, including *sub silentio* pressures and "raised eyebrow" regulation. *Id.* at 19 (quoting *Community-Service Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978)) (Pet. App. at 10a-11a). In these circumstances, the FCC's warning about investigations of broadcasters that reported "few or no" applications from women or minorities was "a powerful threat, almost guaranteed to induce the desired conduct." (Pet. App. 11a).

The court of appeals correctly held that the unconstitutional provisions of the rule could not be severed and that the entire EEO rule should therefore be vacated. *MD/DC/DE Broadcasters*, 236 F.3d at 22-23; 253 F.3d at 733-736 (citing *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988)) (Pet. App. 17a-18a; 21a-26a). The court did not accept the suggestion of many of the Petitioners to sever the unconstitutional portions of the rule by "cut[ting] out all references to 'minorities' in the regulation, thereby leaving the regulation intact with respect to women," because the Commission's intention was always to treat women and minorities identically. *Id.* (Pet. App. 18a). As for Option B of the rule, since one of the FCC's expressed purposes in adopting the rule was to afford broadcasters broad flexibility, the court correctly found that the rule "could not, without Option B, sensibly serve the goals for which it was designed." *Id.* (Pet. App. 22a; *see* 21a-26a).

5. The FCC and the United States did not question the State Associations' right to bring a facial challenge to the rules in the court of appeals. Indeed, the only mention by any party of any supposed problem with such a challenge was a short discussion in a petition for rehearing filed by the Office of Communication, Inc., United Church of Christ ("UCC"). UCC Petition for Rehearing or Rehearing *En Banc* at 18-19.

REASONS FOR DENYING THE PETITION

Neither the United States nor the FCC has sought review of this case. The petitions for writs of certiorari should be denied because (1) the court of appeals' decision does not interfere with the FCC's ability to fulfill any statutory mandate it may have; (2) the case has no necessary impact on the ability of other agencies of the federal government to enforce their regulations concerning employment discrimination or data collection; (3) the court of appeals correctly applied this Court's precedent in finding the FCC rule invalid on its face; (4) the severance issue requires an inquiry into specific and peculiar facts relating to the FCC's intent and the structure of the rule in question that is not appropriate for review by this Court; and (5) Petitioners' arguments that the case is related to disposition of *Adarand* are moot because the Court dismissed the writ of certiorari as improvidently granted in that case. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. dismissed sub nom. Adarand Constructors, Inc. v. Mineta*, 70 U.S.L.W. 4025 (U.S. Nov. 27, 2001) (No. 00-730). Moreover, the pendency of the proceeding initiated by the FCC's Second Notice of Proposed Rulemaking to fashion new EEO rules consistent with the court of appeals' decision, makes review by the Court of the old rules unnecessary.

I. THE FCC HAS INITIATED A RULEMAKING TO IMPLEMENT ITS "EQUAL OPPORTUNITY" OBJECTIVE IN A CONSTITUTIONAL MANNER AND IS NOT HINDERED IN ITS ABILITY TO PURSUE ANY LAWFUL MANDATE.

Rather than seeking review of the court of appeals' decision, the FCC has adopted a Second Notice of Proposed Rulemaking seeking comments on new EEO rules proposed in response to the court of appeals' decision. *See* Press Release, Federal Communications Commission, FCC Proposes New Equal Employment Opportunity (EEO) Rules for Broadcast and Cable (December 13, 2001), *available at* http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2001/nrmm0117.html. The FCC apparently believes it can promulgate a new rule that both serves its purposes and is consistent with the court of appeals' decision. Therefore, any review by this Court is inappropriate.

The FCC's determination to adopt a new rule also makes it premature, to say the least, for Petitioners to argue that the FCC cannot meet its statutory obligations or that the court of appeals' decision somehow "*sub silentio*" struck down Section 334(a) of the Communications Act, 47 U.S.C. 334(a). The FCC's initiation of new EEO rulemaking presupposes that the agency can fulfill any statutory mandate the agency may have, consistent with the court of appeal's decision.

II. THE COURT OF APPEALS' DECISION DOES NOT INTERFERE WITH THE ABILITY OF OTHER GOVERNMENT AGENCIES TO ENFORCE REGULATIONS.

Contrary to the claims of the Petitioners, the court of appeals' decision has no necessary implications for the ability of other agencies to enforce their rules concerning

employment discrimination or data collection. The United States would surely have sought review if, as Petitioners suggest, the court of appeals' decision broadly undercut administrative agencies' ability to enforce their own regulations. The United States was correct when it told the court of appeals that the FCC's regulations were different from hiring regulations of other federal agencies because of the *pressure* that the FCC is able to impose on its licensees. *See generally Head v. New Mexico Bd. of Exam'rs in Optometry*, 374 U.S. 424, 436-437 (1963) (quoting commentators stating, the "licensing power of the FCC...hangs like a constant Damocles' sword over broadcasting" and that the FCC's informal powers resulted in "regulation of programming by raised eyebrow"). As the United States told the court of appeals:

> The licensing authority of the FCC is indeed a powerful tool; the FCC exerts a great deal of influence over holders of broadcast licenses and can revoke a license where a licensee fails to comply with the agency's rules and policies.... Under the Communications Act, the FCC has the responsibility of controlling radio and television channels, and the power to license their use for limited periods of time. The FCC establishes qualifications for broadcasters, can compel the disclosure of certain information from them, and may grant or deny license applications in the public interest. The FCC may alter, suspend, or revoke a license subject to certain procedural safeguards. Indeed, a decision by the FCC to revoke a station's license will essentially render the station inoperable and likely put the broadcaster out of business.

Response of the United States to Petitions for Rehearing and Petitions for Rehearing *En Banc*, at 9 (citations omitted).

The court of appeals ruled that certain aspects of the EEO Rule provided "evidence that the agency with life and death power over the licensee is interested in results, not process, and is determined to get them." *MD/DC/DE Broadcasters*, 236 F.3d at 19 (Pet. App. at 11a). As the United States explained below, this concern would not apply in the context of other agency programs, and the court of appeals' decision therefore does not have clear precedential value concerning those programs. Response of the United States to Petitions for Rehearing and Petitions for Rehearing *En Banc*, at 9-10.

III. THE COURT OF APPEALS' INVALIDATION OF THE EEO RULE ON ITS FACE COMPORTS WITH COURT PRECEDENT AND PETITIONERS HAVE IDENTIFIED NO CIRCUIT COURT SPLIT ON THIS ISSUE REQUIRING RESOLUTION.

The petitions presented to this Court offer no good reason for the Court to review the court of appeals' invalidation of the EEO rule. While both petitions cite *United States v. Salerno*, 481 U.S. 739, 745 (1987), the mere invocation of that decision does not show that the court of appeals' decision conflicts with this Court's precedent on standards for facial challenges. *See* Minority Media & Telecommunications Council, et al. Pet. at 14; Office of Communication, Inc., United Church of Christ Pet. at 15. Indeed, as this Court stated in *City of Chicago v. Morales*, "[t]o the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself...." *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999). The Court went on to say that it is "doubtful" that it "would be appropriate for federal courts to apply the *Salerno* standard in some cases." *Id.*

The court of appeals was squarely within the bounds of Court precedent when it concluded that the EEO rule would pressure broadcasters to make employment decisions on the basis of race because of the overarching power the FCC has over licensees and the requirements of the rule itself. The court of appeals recognized that the FCC, through its licensing authority, wields the ultimate power of "life or death" over broadcasters. From this, the court of appeals properly concluded that the FCC's imposition of the EEO rule inherently pressured broadcasters to engage in unconstitutional discrimination in order to comply with the rule and to avoid investigation. This does not contradict Court precedent in any respect.

The petitions for review disagree with the court of appeals' decision and attempt to alchemize their disagreement into a facial challenge issue. While they are correct to assert that striking down a statute or regulation on a facial challenge is "strong medicine," this Court has not hesitated to dispense such a dose in the face of constitutional maladies such as those diagnosed by the court of appeals in this case. The court of appeals was not required to engage in intellectual acrobatics to envision a marginal instance where the rule might not cause an employer to employ race as a factor in employment decisions. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992) (using as its standard the "large fraction of the cases in which [the law] is relevant"). *See also Bigelow v. Virginia*, 421 U.S. 809, 817 (1975) (holding a statute invalid because the facts well illustrate "the statute's potential for sweeping and improper applications") (citation omitted). Because there is no conflict with Court precedent and the petitions have not identified any split within the circuit courts on this issue, there is no cause to grant review of the issue presented by Petitioners.

IV. THIS COURT DOES NOT GRANT CERTIORARI TO REVIEW THE SPECIFIC EVIDENCE AND FACTS NECESSARY TO A DISPOSITION OF THE SEVERANCE ISSUE IN THIS CASE.

The requests for review should also be rejected because the issue presented turns on the peculiar facts relating to the FCC's intent and the structure of the EEO rule and the Court does not grant certiorari to "review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.); *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.") The legal standard for whether severance is appropriate is established by *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988), as explained by the court of appeals: "[w]hether the offending portion of a regulation is severable depends upon the intent of the agency and upon whether the remainder of the regulation could function sensibly without the stricken provision." *MD/DC/DE Broadcasters*, 236 F.3d at 22; 253 F.3d at 733-734 (Pet. App. 17a, 21a-22a). The question presented by Petitioners can be resolved only by examining, as the court of appeals correctly did, the specific purposes and structure of the EEO rule and other indicia of the FCC's intention. The court of appeals properly focused, for example, on the FCC's expressed purpose to afford smaller broadcasters broad flexibility to tailor their own programs, and whether a severed rule could still sensibly serve that purpose. *MD/DC/DE Broadcasters*, 236 F.3d at 22-23 (Pet. App. 22a). Review on the question presented by Petitioners would require the Court to review these particular and correct determinations, and is not warranted.

V. THE COURT'S DISMISSAL OF *ADARAND CONSTRUCTORS, INC. v. MINETA* RENDERS MOOT PETITIONERS' ARGUMENTS RELATING TO *ADARAND'S* DISPOSITION.

Petitioners' attempt to align this case with the Court's review of *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. dismissed sub nom. Adarand Constructors, Inc. v. Mineta*, 70 U.S.L.W. 4025 (U.S. Nov. 27, 2001) (No. 00-730), fails for at least two reasons. First, the Court's dismissal of *Adarand* disposes of Petitioners' argument that this case should be held pending a decision on the merits in that case. Second, the issue presented for review here had no relation to the issues initially accepted for review in *Adarand*. At issue in *Adarand* were the particularized standards of the Department of Transportation's Disadvantaged Business Enterprise program and the implementation of those particularized standards - and, most importantly, whether those standards and that implementation were consistent with the Fifth Amendment. Petitioners here have not presented *any* issue concerning the Fifth Amendment. Rather, they have posed a question about the nature of facial challenges to administrative decisions.[1]

---

[1]For the same reason, the supposed conflict mentioned by the UCC in its petition (at 27-28) is of no significance. The alleged conflict relates to whether so-called recruitment "outreach" requirements violate the Fifth Amendment, and this has nothing to do with the issue presented here concerning facial challenges to regulations. In any case, as the court of appeals explained, there is no conflict on the Fifth Amendment issue between its decision and those of other circuits. *MD/DC/DE Broadcasters*, 236 F.3d at 20 (Pet. App. 12a-13a).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

RICHARD R. ZARAGOZA
KATHRYN R. SCHMELTZER
BARRY H. GOTTFRIED
Counsel of Record
ELIZABETH B. WYDRA
SHAW PITTMAN LLP
2300 N Street, N.W.
Washington, D.C. 20037-1128
(202) 663-8000

Attorneys for Respondents

MD/DC/DE BROADCASTERS ASSOCIATION
ALABAMA BROADCASTERS ASSOCIATION
ALASKA BROADCASTERS ASSOCIATION
ARIZONA BROADCASTERS ASSOCIATION
ARKANSAS BROADCASTERS ASSOCIATION
CALIFORNIA BROADCASTERS ASSOCIATION
COLORADO BROADCASTERS ASSOCIATION
CONNECTICUT BROADCASTERS ASSOCIATION
FLORIDA ASSOCIATION OF BROADCASTERS
GEORGIA ASSOCIATION OF BROADCASTERS
HAWAII ASSOCIATION OF BROADCASTERS
IDAHO STATE BROADCASTERS ASSOCIATION
ILLINOIS BROADCASTERS ASSOCIATION
INDIANA BROADCASTERS ASSOCIATION
IOWA BROADCASTERS ASSOCIATION
KANSAS ASSOCIATION OF BROADCASTERS
KENTUCKY BROADCASTERS ASSOCIATION
LOUISIANA ASSOCIATION OF BROADCASTERS
MAINE ASSOCIATION OF BROADCASTERS

MASSACHUSETTS BROADCASTERS ASSOCIATION
MICHIGAN ASSOCIATION OF BROADCASTERS
MINNESOTA BROADCASTERS ASSOCIATION
MISSISSIPPI ASSOCIATION OF BROADCASTERS
MISSOURI BROADCASTERS ASSOCIATION
MONTANA BROADCASTERS ASSOCIATION
NEBRASKA BROADCASTERS ASSOCIATION
NEVADA BROADCASTERS ASSOCIATION
NEW HAMPSHIRE ASSOCIATION OF BROADCASTERS
NEW JERSEY BROADCASTERS ASSOCIATION
NEW MEXICO BROADCASTERS ASSOCIATION
NEW YORK STATE BROADCASTERS
ASSOCIATION, INC.
NORTH CAROLINA ASSOCIATION OF BROADCASTERS
NORTH DAKOTA BROADCASTERS ASSOCIATION
OHIO ASSOCIATION OF BROADCASTERS
OKLAHOMA ASSOCIATION OF BROADCASTERS
OREGON ASSOCIATION OF BROADCASTERS
PENNSYLVANIA ASSOCIATION OF BROADCASTERS
RADIO BROADCASTERS ASSOCIATION
OF PUERTO RICO
RHODE ISLAND BROADCASTERS ASSOCIATION
SOUTH CAROLINA BROADCASTERS ASSOCIATION
SOUTH DAKOTA BROADCASTERS ASSOCIATION
TENNESSEE ASSOCIATION OF BROADCASTERS
TEXAS ASSOCIATION OF BROADCASTERS
UTAH BROADCASTERS ASSOCIATION
VERMONT ASSOCIATION OF BROADCASTERS
VIRGINIA ASSOCIATION OF BROADCASTERS
WASHINGTON STATE ASSOCIATION
OF BROADCASTERS
WEST VIRGINIA BROADCASTERS ASSOCIATION
WISCONSIN BROADCASTERS ASSOCIATION
WYOMING ASSOCIATION OF BROADCASTERS

(4)

Supreme Court, U.S.
FILED
JAN 7 2002
CLERK

No. 01-662

In the

Supreme Court of the United States

OFFICE OF COMMUNICATION, INC.,
UNITED CHURCH OF CHRIST,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
& THE UNITED STATES OF AMERICA

and

MARYLAND/DISTRICT OF COLUMBIA/
DELAWARE BROADCASTERS ASSOCIATION, *et. al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY

SHELBY D. GREEN
78 No. Broadway
White Plains, N.Y. 10603
(914) 422-4421
Counsel of Record

11 pp

Table of Contents

Table of Authorities iii
Argument 1

I. The Error of the Court of Appeals' Ruling is Not Negated by How Much of the Agency's Rule is Left Standing 1

II. A Decision Based Upon Erroneous Application of Law by the Court of Appeals is Nonetheless Law and Binds Agencies Within the Jurisdiction .. 2

III. Respondent's Reading of Other Circuit Court Opinions is Unduly Narrow 5

Conclusion 8

Table of Authorities

Cases

Adarand Constructors, Inc. v. Mineta, 532 U.S. 941 (2001) 4
Billish v. City of Chicago, 962 F.2d 1269 (7th Cir. 1992) .. 7
City of Richmond v. J.A. Croson, 488 U.S. 469 (1989) ... 6
Duffy v. Wolle, 123 F.3d 1026 (8th Cir. 1997) 6
Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548 (11th Cir. 1994) 6
International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) 4
Peightal v. Metropolitan Dade County, 26 F.3d 1545 (11th Cir. 1994) 6
Raso v. Lago, 135 F.3d 11 (1st Cir. 1998) 5,6
Shuford v.Alabama State Bd. of Educ., 897 F. Supp. 1535 (M. D. Ala. 1995) 6
South Suburban Housing Center v. Greater South Suburban Board of Realtors, 935 F.2d 868 (7th Cir. 1991) 7
Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980) 3
United States v. Kanchanalak, 192 F.3d 1037 (D.C. Cir. 1999) 3
Vermont Yankee Nuclear Power Corp. v. Nat'l Resources Defense Co. Inc., 435 U.S. 519 (1978) 4
Yates v. Evatt, 500 U.S. 391 (1991) 4

Other Authorities

Fair Housing Act, 42 U.S.C. §3604, *et.seq.* 7

Petitioner, Office of Communication Inc., United Church of Christ ("UCC"), submits this reply to the arguments in opposition to the petition for a writ of certiorari made by the respondents, the United States and the State Broadcasters Associations ("Broadcasters"). We address their respective arguments below.

I. The Error of the Court of Appeals' Ruling is Not Negated by How Much of the Agency's Rule Is Left Standing

While agreeing with petitioner that the court of appeals erred in substantial respects in striking down the Federal Communications Commission's ("Commission") equal employment opportunity ("EEO") rules in a facial challenge, the United States nonetheless maintains that the decision does not warrant review by this Court. The United States would overlook the court of appeals' error, it seems, because the error was not complete -- it left standing, according to the United States, "the most important feature" of the rule, Option A, although the court refused to sever that part from Option B which it found to be unconstitutional. Brief for the Federal Respondents in Opposition ("U.S. Opp.") at 13. The United States states further that the Commission had contended throughout this litigation that it could satisfy its statutory EEO obligations through Option A alone. U.S. Opp. at 13, 17.

But these are resignations that do not negate the broad effects of the court of appeals' ruling outside its application to Option A, most particularly, the curtailment of the power of an agency to adopt rules and policies in accordance with its own judgment. It remains that after long-consideration and a lengthy rulemaking proceeding, the Commission determined that its statutory obligations could *best* be achieved by adopting *both* options. If the Commission were now to re-adopt Option A as the entire EEO rule, as the United States and Broadcasters suggest, it would not be the result of a policy choice made by

the Commission, but one imposed by the court of appeals.

Moreover, as UCC has maintained throughout this litigation, Options A and B together fail to satisfy the Commission's statutory obligation to ensure that radio spectrum services are available without discrimination on the basis of race or ethnicity. Brief for Appellant, on Petition for Review to the United States Court of Appeals for the District of Columbia Circuit, 00-1198 ("Petition for Review"). For more than three decades, the Commission believed that a policy of non-discrimination alone was insufficient to prevent the exclusion of minorities from broadcasting opportunities and had thus required affirmative outreach efforts directed at minorities. Petition for Writ of Certiorari, at 2-5. The Commission abandoned these requirements in the new rule without adequate justification or explanation. Petition for Review, at 25-38.[1]

II. A Decision Based Upon Erroneous Application of Law is Nonetheless Law and Binds Agencies Within the Jurisdiction

The United States asserts that review is not warranted for the further reason that the court of appeals' decision does not announce any broad principles of law, but merely misapplies settled standards to the particular facts of the case (U.S. Opp. at 13, 14), and that the Commission and future litigants might avoid the effects of the court's errors by distinguishing future cases on the facts. U.S. Opp. at 13, 17-21. Even accepting this assessment for the sake of argument, it remains that the decision in all its misapplication is law and immediately binds the Commission, as well as other federal agencies and litigants, until it is reversed. And in consequence of the important societal

---

[1]Because the court of appeals declared the rule invalid on constitutional grounds, it dismissed UCC's petition for review as moot.

interests in orderly adjudication and evenhanded, consistent and predictable application of legal rules, it is not a simple thing for a court to depart from an earlier decision. Indeed, a litigant who asks a court to disavow one of its precedents bears a severe burden. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980); *see also United States v. Kanchanalak*, 192 F.3d 1037, 1038 n.1 (D.C. Cir. 1999)(absent a contrary decision of the Supreme Court or enactment of a controlling statute, a panel has no authority to overrule another panel; that power residing in the full court only). And the burden of overturning a ruling, as well as the burden of distinguishing the earlier case, is all the more difficult where the court has ruled not on the basis of a particular set of facts, but on hypotheticals and speculation as the court of appeals did here. U.S. Opp. at 14-15, 17. In the ordinary case, the problem of determining whether an earlier decision is on point and not factually distinguishable, involves not only the question of what the facts were in the preceding case, but also which of the facts of the earlier case were actually relied on by the court in deciding the case. Where the litigant is unable to make these determinations, for example, because the earlier court relied on hypotheticals, arguments and proofs will be presented without the litigant knowing how they will be used by the court, with the result that their essential value is determined only after the presentation has been closed. That is what occurred here. Can it be expected that in the next case, a panel of that court will not confound the litigant by relying upon new hypotheticals?

Furthermore, despite all of respondents' efforts to delimit the meaning and scope of the ruling, the court of appeals did announce broad principles of law. It declared that the collection of data on the race and ethnicity of job applicants is a race-conscious act and constitutionally suspect. Before this ruling, as the United States points out, (U.S. Opp. at 15), the Commission and other federal agencies had lawfully required regulated entities to collect such data, for the reason that

statistical imbalances as might be shown by such data are a means of identifying potentially discriminatory practices, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977) and for ensuring compliance with non-discrimination requirements. *See* U.S. Opp. at 15 and citations therein.

It is true, as the United States asserts, that the court of appeals did not purport to reformulate the standards for facial challenges. U.S. Opp. at 17. Instead, the court of appeals ignored those standards laid down by the Court and employed standards of its own making. These too are new principles. That they are invalid as in conflict with the standards pronounced by the Court does not deny the fact of their adoption in the case at issue or prevent their application in future cases. Thus, rather than being *sui generis*, the court of appeals' ruling is controlling.

Moreover, it is not the case as the United States and Broadcasters assert, that merely because a lower court ruling involves a misapplication of principles of law, that review by writ of certiorari is not warranted. U.S. Opp. at 17; Brief in Opposition for the State Broadcasters Associations ("Broadcasters Opp.") at 9. On the contrary, in *Vermont Yankee Nuclear Power Corp. v. Nat'l Resources Defense Co. Inc.*, 435 U.S. 519, 525, 556 (1978), the Court granted review out of "concern that [the court of appeals] had seriously misread or misapplied ... statutory and decisional law..." and because the court "improperly intruded into the agency's decisionmaking process." *See also Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941 (2001)(certiorari granted to consider whether "the court of appeals misapplied the strict scrutiny standard"); *Yates v. Evatt*, 500 U.S. 391 (1991)(certiorari granted because the lower court "appeared to have applied the wrong standard ... and to have misread the record to which the standard was applied").

III. Respondent's Reading of Conflicting Circuit Court Opinions is Unduly Narrow

The United States asserts that the cases cited by petitioner as showing a conflict among the circuits on the issue of the constitutionality of recruitment efforts that specifically target racial or ethnic groups, are distinguishable. U.S. Opp. at 21-24. The United States' reading of the ruling at issue and of the cases cited by petitioner is too narrow. The court of appeals ruled that the requirement to collect data on the race and ethnicity of applicants would pressure licensees to recruit that way. App. 13a-14a. In the court of appeals' view "preferential recruiting" alone was suspect. App. at 13a. It was thus the loss of the opportunity to apply for a job, not to be hired, that the court of appeals identified as the unconstitutional denial, although in a footnote, it suspected and faulted the Commission for the purpose of increasing the number of minorities hired. App. 14a, n. ***.

The United States would distinguish *Raso v. Lago*, 135 F.3d 11 (1st Cir. 1998), on the basis that the plaintiffs there had not alleged facts that suggested "'a secret discriminatory standard, pattern of past practice, or motive' of distinguishing among applicants'" for housing under a federally subsidized housing program. U.S. Opp. at 22. But in *Raso*, the court found the government's "purpose to increase minority opportunities for apartments" to be "evident." 135 F.3d at 14. And even though achieving this purpose meant denying whites a statutory preference, the court upheld the plan, which also required affirmative efforts to attract minority, as well as majority applicants. *Id.* at 14, 16.

The United States would also distinguish *Raso* on the basis that in the ruling at issue here, the Commission could achieve its purposes through its life and death powers over licensees. U.S. Opp. at 22. But in *Raso*, there were similar powers in the government where it could withhold funding for

the construction of the housing project. 135 F.3d at 14.

While the plaintiff in *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997) alleged a denial of equal protection by the defendant's hiring of a "'substantially less qualified female applicant' because of her gender", *Id.* at 1032, he offered as evidence of discrimination a recommendation by the hiring panel that efforts be made to recruit minorities and women for the position. *Id.* at 1038. While the court found no indication that the defendant actually took steps to specifically recruit female candidates, it assumed that a jury could find that the defendant did recruit on that basis, but ruled that "[a]n employer's affirmative efforts to recruit minority, female applicants does not constitute discrimination." *Id.* at 1038-39, *citing Shuford v. Alabama State Bd. of Educ.*, 897 F. Supp. 1535, 1553-54 (M. D. Ala. 1995)("affirmative recruitment is a neutral measure") (interpreting *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1571 (11th Cir. 1994), *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-58 (11th Cir. 1994). The ruling was therefore in direct conflict with that of the court of appeals here.

In *Peightal v. Metropolitan Dade County*, 26 F.3d 1545 (11th Cir. 1994), in determining whether a "race-conscious" remedy was narrowly tailored to serve a compelling state interest, the court stated that "an initial inquiry should be undertaken to determine whether the ... government considered 'the use of race-neutral means to increase minority' participation. [*City of Richmond v. J.A.*] *Croson*, 488 U.S. [469] at 507...[1989]". The "race-neutral measures" identified by the court as having been considered were "high school and college recruiting programs providing information and soliciting applications from minorities and women, outreach programs spearheaded by existing minority employees, and the designation of a recruitment specialist to make presentations to apprise minorities and women of job opportunities. *Id.* at 1557-58. The courts in *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548,

1571 (11th Cir. 1994) and *Billish v. City of Chicago*, 962 F.2d 1269, 1290 (7th Cir. 1992), made similar findings.

The relevant point from these cases is the characterization of the very measures complained of by the court of appeals here, as "race-neutral." Since race-conscious measures, even as remedies for past discrimination, are subject to strict scrutiny, whereas race-neutral measures are not, the United States' distinctions are not well-founded.

In *South Suburban Housing Center v. Greater South Suburban Board of Realtors*, 935 F.2d 868 (7th Cir. 1991), while there was a First Amendment issue raised, as the United States asserts (U.S. Opp. at 23), the main claim by the plaintiff was a violation of the Fair Housing Act ("FHA"), 42 U.S.C. §3604, *et. seq.*, which prohibits, *inter alia*, discrimination in the sale or rental of housing on the basis of race or ethnicity. Just as the court of appeals here held as to the Fifth Amendment, the plaintiffs there maintained that the FHA prohibited the affirmative marketing of homes to persons of a particular race. *Id.* at 873. They argued that "the affirmative marketing plan further[ed] the goal of 'ending racially segregated housing' at the expense of limiting the 'availability of housing' for [persons of their race]." *Id.* at 882. The plan required race-conscious advertising by realtors to attract persons of the other race and the keeping of records indicating the race of persons shown homes. *Id.* 872, 873. But contrary to the court of appeals here, the Seventh Circuit ruled that it was not discriminatory to implement the plan where it did not exclude persons of the other race from housing opportunities. *Id.* at 883.

CONCLUSION

WHEREFORE, based upon the foregoing, petitioner prays that a writ of certiorari be issued for the review and reversal of the lower court decision and for a remand for a

consideration of those claims made by petitioner which were dismissed as moot by that court.

Respectfully submitted,

SHELBY D. GREEN
78 No Broadway
White Plains, N.Y. 10603
(914) 422-4421

Counsel of Record

Dated: January 7, 2002